

**AGENDA**  
**TEXCOM MEETING**  
Trusts and Estates Section  
State Bar of California  
Saturday January 12, 2008  
9:30 am-3:30 pm  
LAX MARRIOTT  
Los Angeles, California

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*"There's no need for your kitty to be envious. After state and federal taxes and legal and administrative fees, Chessy's share of Aunt Martha's estate came to hardly anything."*

**I. WELCOME, INTRODUCTIONS, AND REPORTS OF CHAIR/VICE CHAIR AND ADMINISTRATOR (15 minutes)**

- A. Welcome [Stern]
- B. Approval of Minutes of November 3 Meeting [Stern]
- C. Report of Chair (5 min) [Stern]
- D. Report of Vice Chair (5 min)  
Finance and Budget – Financial Report [Tong]
- E. Report of Section Administrator (5 min) [Orloff]

**COMMITTEE, TASK FORCE AND LIASION REPORTS**

**II. TRUST & ESTATE ADMINISTRATION (70 min) [BURGER]**

- A. "Large Estate Affidavits" (15 min) [Henden]
- B. Accounts & Reports (20 min)
- C. 850 Petitions—form drafting (15 min)
- D. Judicial Council Rule of Court on Filing Fees: Texcom opinion sought (5 min)
- E. Trustee notification issue (PC 16061.7) (15 min)
- F. Using powers of attorney to create trusts and wills (if time available)

**III. ETHICS (5 minutes) [LODISE]**

- A. Ethics Guide—Status; Marketing plans
- B. RRC and TEXCOM's B&PC 6068(e) leg proposal
- C. RRC work on Rule 3-310

**IV. CLRC (50 min) [HORTON]**

- A. No Contest Clause Study (40 min) [Horton]
- B. Deeringer Memo on McKenzie v Vanderpoel [Reggiardo]

**V. LITIGATION (20 minutes) [ZABRONSKY]**

- Attorney Fee Shifting

**VI. EATE (10 minutes) [BURGER-HARTOG]**

- E-poll

**VII. QUARTERLY (10 min) [HAYES-HAND]**

- A. Manuscripts
- B. Authors
- C. Advertising Solicitation

## **LUNCH**

### **VIII. NOMINATING COMMITTEE (5 minutes) [HARTOG]**

### **IX. EDUCATION (20 min) [ITO]**

- A. Report of Education Chairs Meeting [Ito]
- B. 2008 Stand Alone programs—2008 proposals
  - a. “Problems Fiduciaries Get Into”—5/30, 6/13
  - b. “Property Through the Generations”— 4/25
- C. 2007/2008 Winter SEI
- D. Suggestions for 2008 Monterey Annual Meeting
- E. Your Legal Rights [Ehrman]

### **X. TECHNOLOGY (10 minutes) [GAW]**

- A. E-News
- B. Workroom issues

### **XI. LEGISLATION (20 min) [REGGIARDO/COREY]**

- A. New procedures for 2008
- B. Timeline for TEXCOM legislative proposals—  
BOG review of proposals [Marc Sallus]
- C. Priorities for Bills Presently in Legislature
- D. Mandatory procedures re legislative proposals
- E. Online Bill Tracking legislative information:  
[www.leginfo.ca.gov/](http://www.leginfo.ca.gov/)

#### **IMPORTANT GUIDELINES:**

- Please use approved format for legislative proposals.
- Please use approved comment form for legislation comments.
- Always write to Saul Berkovitch, not directly to a member of legislature or legislative staff.
- Confirm testimony needs with Legislation Chair.
- If you agree to testify, be there unless otherwise notified.

### **XII. EDUCATING SENIORS (15 minutes) [SALLUS]**

- A. Report on outreach using other entities
- B. Update on Senior Information Card [Tong-Sallus]
- C. Elder Issues Symposium

### **XIII. ESTATE PLANNING (40 minutes) [MACDONALD]**

- A. Formal Will Witness Requirements [Reggiardo]
- B. AB 250 Revocable TOD Deeds [Ito/Schenone]
- C. Pet Trust Legislation ( 30 minutes) [Lassie]
- D. COPRAC Opinion 2007-173-Will Deposits [Schenone]

**XIV. MEMBERSHIP AND MARKETING (5 minutes) [LAWSON-KOSLOFF]**

**XV. INCAPACITY (25 minutes)**

**[LODISE]**

A. Professional Fiduciaries Bureau

**[Matulich]**

B. Bills to Watch:

a. SB 800 (general care plans, notice or  
hearings prior to moving conservatees)

**[Stern]**

b. SB 573 and AB 367 Annuity standards

**[Corey]**

c. AB 316 (TEXCOM bill, conservatorship investment  
standards)

**[Stern]**

C. Probate Code section 1470 (Appointed counsel for the already  
Represented)

**[Beltran-Lee]**

D. Uniform National Guardianship and Protective Proceedings  
Jurisdiction Act

**[Lodise]**

**XVI. CONSERVATORSHIP TASK FORCE (10 min)**

**[COREY]**

Judicial Council Forms Opinion Sought—Temporary Conservator-  
Ships-Guardianships: Orders; Compliance Form for Court appointed  
Counsel for Conservatees-Wards

**XVII. INCOME AND TRANSFER TAXES (10 min)**

**[JAECH]**

Out of State Trustee and Fiduciary Income Tax

**[Hayes]**

**XVIII. CEB (3 min)**

**[GOOD]**

**XIX. NCCUSL (5 min)**

**[FITZPATRICK]**

**XX. CONFERENCE OF DELEGATES (5 minutes)**

**[HENDEN]**

**XXI. NEW BUSINESS**

**XXII. COMING ATTRACTIONS**

**NEXT TEXCOM MEETING**

**February 9, 2008**

**9:30 am-3:30pm**

**OAKLAND AIRPORT HILTON**

Executive Committee  
Trusts and Estates Section  
State Bar of California  
San Francisco, California  
November 3, 2007

Members Present: Peter S. Stern (Chair), May Lee Tong (Vice-Chair), James J. Brown, Jr., Jeremy B. Crickard, Richard L. Ehrman, Nancy E. Howard, Charlotte K. Ito, Jane C. Lee, Barry K. Matulich, Marc L. Sallus, and Rebecca L. Tomlinson Schroff.

Members Absent: David W. Baer, Thomas E. Beltran, Bette B. Epstein and Robert S. Kosloff.

Advisors Present: Richard A. Burger, Edward J. Corey, Jr., Barry C. Fitzpatrick, David B. Gaw, John A. Hartog, Neil F. Horton, Jeffrey A. Jaech, Catherine A. Lawson, Margaret G. Lodise, James B. MacDonald, Tracy M. Potts, and Silvio Reggiardo III.

Advisors Absent: Margaret M. Hand, Philip J. Hayes, Kay E. Henden, Ruth A. Phelps, and Adam F. Streisand.

Others Present: Don E. Green (Judicial Liaison), Suzanne Good (CEB), Susan M. Orloff (Section Administrator), Larry Doyle (former Chief Legislative Counsel), Saul Bercovitch (Legislative Representative), and Leonard W. Pollard II (Reporter).

**I. WELCOME, INTRODUCTIONS AND REPORTS OF  
CHAIR/VICE CHAIR AND ADMINISTRATOR**

A. Welcome [Stern]

Chair Stern welcomes TEXCOM to his first meeting. For the benefit of new members, he asks TEXCOM to introduce themselves, which occurs. In a general comment, he expresses a hope that no Southern California members' homes were damaged during the recent wildfires.

B. Approval of Minutes of September 30 Meeting [Stern]

At page 6, under "Accounts & Reports", line three, the spelling of Mr. Gerson's name is corrected; at page 8, in the seventh line, a period is added at the end of the sentence; and at page 19, under Conference of Delegates, Resolution 11-05-07, the sentence is corrected to state "We disapproved this proposal, but it was approved"; with these corrections, these Minutes are unanimously approved.

C. Report of Chair [Stern]

Chair Stern presents an award. He recently asked Committee Chairs and Vice Chairs to review our website's resource room to add non-TEXCOM committee contributors to the listserve. Mr. Jaech stands out as a Committee Chair who checked out the listserve, did the corrections, and

checked it back in without comment. Chair Stern then provides Mr. Jaech with a bottle of Pinot Noir. [Later, Mr. MacDonald says that he similarly and effortlessly achieved the same results as Mr. Jaech; and Chair Stern offers to provide a similar reward.] Chair Stern notes that currently ACTEC is meeting in West Virginia, so we have competition for our meeting today. Our next meeting is January 12, 2008 in Los Angeles; he urges TEXCOM to purchase our airline tickets now to obtain low fares.

D. Report of Vice Chair  
Finance and Budget – Financial Report

[Tong]

Ms. Tong reports that no financial report is available, as yet.

E. Report of Section Administrator

[Orloff]

Ms. Orloff confirms that our January meeting will be at a hotel near the Los Angeles airport, and probably the LAX Marriott. She reminds TEXCOM to submit our expense reports for this meeting by December 3, 2007; but only if you wish to be reimbursed. Ms. Orloff will e-mail an expense reimbursement form to TEXCOM; however, she notes that form is also available in our workroom.

Input Needed for 2008 Retreat. Discussion next turns to Chair Stern's 2008 Retreat at Tenaya Lodge near Yosemite. We were last there in the early 1990's and the social activities were quite memorable. That is, we rode on a logging train and, during that ride, a snowball fight broke out. After that, TEXCOM was somewhat chilled and found refuge in a roundhouse where, coincidentally, a Blue Grassband was playing. While TEXCOM was being warmed by the fire and refreshments, some felt the urge to dance, not only on the floor, but also on the tables, and the rest is history. Chair Stern urges TEXCOM to bring the family. If we wish to do rustic activities, then Ms. Orloff will need input. This Retreat should be both productive and fun, in addition to having Chair Stern's now traditional "death march." Mr. Sallus adds that multiple hiking trails are available, as well as cross country skiing if the weather is right. Ms. Orloff asks TEXCOM to explore its interests in the varied activities, and let her know those interests by mid-January, 2008 so she can make arrangements.

Thirty-First Annual Program. Our Thirty-First Annual Fall Program was yesterday at the Hotel Nikko in San Francisco, and Ms. Orloff reports that we had a good turnout. There were approximately 128 attendees, and she received good reports on the presentations. That attendance produced a profit, even though the brochures advertising the program went out only two weeks before. Next time, we should start beating the drum for attendance two months before the event, if possible. One year, we had approximately 250 attendees.

## COMMITTEE, TASK FORCE AND LIASION REPORTS

### II. LITIGATION

[ZABRONSKY]

#### Attorney Fee Shifting

Mr. Zabronsky initially notes that the Litigation Committee has yet to discuss the attorney fee shifting materials and report generated by the Trusts & Estates Administration Committee; that report lists the various Probate Code sections allowing attorneys fees, some of which have divergent criteria. As background, Mr. Zabronsky notes that, over time, provisions for attorney's fees have been added to various Probate Code sections on an *ad hoc* basis; however, those sections have not been coordinated and contain different standards. The first question is whether those sections should be harmonized and, secondly, whether attorney's fees should be made available in more cases. Ms. Hand earlier noted that the trustee sits on a war chest, while the beneficiary is frequently without funds. She wondered if we should allow beneficiaries to access trust funds when they prevail in trust litigation.

Mr. Zabronsky initial view is that, even though the sections providing for attorney's fees are diverse, attorney's fees are rarely a factor in trust litigation. Therefore, any change will be an insubstantial change. He confesses that he likes the American Rule which requires each party to bear their own attorney's fees. On the other hand, attorney's fees could be made to be a one-way street, singling out fiduciaries. Most statutory one-way streets reflect matters of public policy, such as elder abuse, anti-trust proceedings, civil rights proceedings, and so on. In any event, Mr. Zabronsky believes that increasing the availability of attorney's fees would make it more difficult to resolve cases and increase people's hate for one another.

Mr. Hartog expands on that point. He notes that, for example, section 17211 awards attorney's fees in the face of bad faith and unreasonable conduct, whereas most other statutes require only bad faith. The important point here is that the Probate Code should have a coherent approach to the award of attorney's fees. Additionally, the award of attorney's fees is in the court's discretion, and courts would be assisted by having a single coherent standard and a single statutory scheme. Mr. Hartog believes the award of attorney's fees may discourage spurious litigation.

Mr. Green next gives his judicial perspective. He supports the award of attorney's fees against the fiduciary who unreasonably fails to do his/her duty in bad faith. That is, the fiduciary languishes in his/her job and does not keep records and so on. When that fiduciary is finally removed, time has passed, and a successor must reconstruct the past. In that situation, Mr. Green thinks the fiduciary should be liable for the cost of reconstruction. Put another way, the beneficiary who successfully challenges the languishing fiduciary might receive both good news and bad news. The good news is that the estate has been put in order, and the bad news is that the beneficiary must pay \$35,000 in attorney fees.

Mr. Sallus comments that this debate has gone on for years. Case law provides little direction, except the *Estate of Ivy* (1994) 22 CA 4<sup>th</sup> 873. Mr. Sallus moves that this discussion be tabled until the Litigation Committee reviews the comments in the Trust & Estates Administration Committee's Report, and responds with recommendations in writing. After a brief hush, Mr.

Hartog observes that Mr. Sallus received no second. But Mr. Sallus quickly fires back that, under Roberts Rules, a motion to table needs no second. And without pausing for any response, Mr. Zabronsky returns to business. He says that Mr. Green's point would distinguish between litigation fees and cleanup costs. Chair Stern asks Mr. Zabronsky to have the Litigation Committee review the available report and comment on it at the next meeting.

### **III. TECHNOLOGY**

**[GAW]**

#### **A. E-News**

Mr. Gaw says our target is to generate an E-News every two months for Section members. A one-page handout is entitled Trusts & Estates E-News Schedule 2008, referencing an Issue Content Deadline and Responsible Member. By the deadline date, the responsible member is to provide Mr. Gaw via e-mail in a Word document, the text of the upcoming E-News edition. The Responsible Members for issues include Mr. Gaw, Mr. Jaech, Ms. Lawson, Mr. Corey, Mr. Brown, and Mr. Baer. Also listed are Responsible Members for Ongoing Alerts, including Ms. Hendon and Mr. Kosloff, who would prepare the Alerts. If you have an Alert item, send it to those members.

#### **B. Workroom issues**

Chair Stern has asked Ms. Hendon to coordinate a Workroom Technology Subcommittee. Our objective is to flag issues and to familiarize TEXCOM with the Workroom. For example, you need not check out a document to read it; instead just click on it. The Checkout function is to make changes after checking a document out, and then to upload those changes to the Workroom. Ms. Tong has Word 2007, and Chair Stern notes that in the last California Lawyer magazine, "Rosie" explained how to use Word 2007. Mr. Sallus suggests that, at the annual meeting, we provide a review course for old and new members alike. Ms. Orloff likes that idea, but in a Retreat setting, the cost of having internet connection available to members in conference rooms varies greatly among hotels. To update her memory, Ms. Orloff will do a survey of internet connection costs with various hotels and provide a report. She notes that the hotel cost is not substantially affected by having wireless connections.

#### **C. Protocols**

Committee Meeting Invitations. A handout is a three-page list of TEXCOM Committees: 2007-2008, including a final page which lists Officers, Committee Chairs/Quarterly Editors (alpha order). Please add these members as optional invitees on all committee meeting invitations for the Workroom.

### **IV. ESTATE PLANNING**

**[MACDONALD]**

#### **A. COPRAC Opinion 05-003**

**[Schenone]**

State Bar of California Standing Committee on Professional Responsibility and Conduct ("COPRAC") Formal Opinion Interim No. 05-003 is a five-page handout. The issues framed are whether an attorney, consistent with ethical obligations, may deposit and/or register a Client's will or other testamentary documents ("will") with a private will depository, without the Client's

consent? It essentially states that an attorney who retains a client's will on deposit may terminate the deposit in accord with the client's instructions and/or consent. If the attorney cannot locate the client, the attorney may only terminate the deposit pursuant to Probate Code section 700, et seq. An attorney may register certain identifying information about a client's, will in a private will registry if the attorney can determine, based upon knowledge of the client, the client's matter, and investigation of the will registry, that registration will not violate the attorney's fiduciary duties of confidentiality and competence.

## B. Formal Will Witness Requirements

[Reggiardo]

At the meeting, Mr. Reggiardo provides a six-page Legislative Proposal regarding Will Execution Requirements, addressed to State Bar Office of Governmental Affairs. Specifically, the proposal would amend Probate Code section 6110. Its Introduction is colorful: "California has technical and unintuitive printed will execution requirements that lay a trap for those executing wills, particularly self-drafted wills."

As background, this proposal was discussed in the September 2007 Meeting Minutes at page 4, and in the June 2007 Meeting Minutes at pages 12-14. The proposal would amend section 6110 to include a limited form of UPC's section 2-305 "harmless error" rule, which allows a court to uphold a will (or codicil) not executed with normal statutory requirements if the court finds by clear and convincing evidence that the testator intended the document to be the testator's will. Additionally, section 6110 would be amended to codify *Estate of Saueressig* (2006), 38 Cal. 4<sup>th</sup> 1045, which holds that a witness to a printed will must sign the will during the testator's lifetime.

Mr. Reggiardo says he received two comments on this legislative proposal. One came from former Chair Valerie Merritt, who said adopting a harmless error rule is appropriate, but not the UPC version because it goes further, addressing writing which is added upon a will, perhaps partially revoking or altering the will. Mr. Reggiardo agrees, and the Text of Proposal at page 6 provides the proposed statutory language; specifically in subsection (d) he strikes the language regarding "writing added upon a will" etc.

The second comment came from the State Bar Standing Committee for the Delivery of Legal Services, which is concerned that the clear and convincing evidence standard is too uncertain; however, Mr. Reggiardo does not agree. According, Mr. Reggiardo moves to approve the text of the legislative proposal amending section 6110, to adopt a limited form of the UPC section 2-305 "harmless error" rule, and to codify the *Estate of Saueressig*.

In TEXCOM discussion, a typo is noticed at page 4 in the last paragraph, first line, - change the word "invalid" to be "valid." Asked about applicable procedures, Mr. Doyle says this proposal now goes to Board of Governors.

TEXCOM action: Except for Mr. Corey, who abstains, TEXCOM unanimously approves this legislative proposal.

Reportedly, the State Bar's Stakeholder Relations Committee meets immediately before the Board of Governors meeting. And we need a representative to attend that meeting. Chair Stern

scans the room for a Los Angeles area member. He learns that Ms. Lodise has a probable conflict in Orange County Superior Court. However, Mr. Sallus can probably appear. Of interest, the new Chair of the Stakeholders Relations Committee is our own Board of Governors liaison, Carmen Ramirez. Our representative will primarily answer any questions of this committee.

C. AB 250 Revocable TOD Deeds [Ito/Schenone]

Mr. Horton reports that CLRC's Brian Hebert is meeting this month with both the Senate Judiciary Committee and the Assembly Judiciary Committee regarding Revocable TOD Deeds.

D. State Bar Brochures [Ehrman]

Mr. MacDonald reports that Mr. Ehrman has done a great job revising the State Bar Brochures involving estate planning. Those brochures have also now been translated into multiple languages. And this item can be deleted from the agenda.

V. MEMBERSHIP AND MARKETING [KOSLOFF]

Mr. Ehrman reports that, in an Education Committee teleconference, they discussed sending blast e-mails to local bar associations to advertise our educational programs. Intuitively, Ms. Orloff responds. She says that if we have the names of the local bar association leaders, then we could send information to them, and ask them to forward that information to local bar members. However, someone needs to harvest the information regarding local bar leaders. Knowledgably, Mr. Sallus says the LA Daily Journal has a list of county bar associations and the executive directors. Accordingly, Ms. Orloff asks the Membership and Marketing Committee to make a list of the contact persons in local bar associations and to provide that information to her.

VI. EATE [BURGER-HARTOG]  
A. Protocols

"EATE" is the acronym for the Elective Administration of Trusts and Estates Project, which is immediate former Chair Hartog's pet project. A 16-page handout is captioned Executive Committee Proposal for "Elective Administration" of Decedents' Estates. This proposal for elective administration would allow a personal representative to administer a probate estate with minimal court supervision, if the beneficiaries are cooperative. That is, elective administration would be an alternative to the current system of formally administering probate estates. The current system would remain intact and would be utilized for those estates where elective administration is either unavailable or inappropriate. TEXCOM is preparing to survey its Section members to learn whether they approve of this proposal. Conceivably, if the Section members do not approve the proposal, then TEXCOM would not necessarily present it to the Board of Governors as a legislative proposal.

The handout contains 15 pages of information to educate Section members on "Elective Administration," and a one-page E-poll. The information is broken into four categories:

(I) Introduction; (II) Arguments For and Against Proposals; (III) Chronology of a Typical Elective Administration; and (IV) Frequently Asked Questions. The E-poll itself asks five questions, as follows:

- I. How long have you been in practice?;
- II. What percentage of your practice relates to trusts and estates practice?;
- III. Do you oppose or favor the general concept of “elective administration”?;
- IV. How helpful are the materials describing the elective administration proposal to your understanding of it?;
- V. Comments.

Mr. Burger begins the discussion. At the last meeting, TEXCOM officially voted to delete from this proposal the requirement of newspaper publication prior to appointment of a personal representative. [see September 30, 2007 Meeting Minutes p. 18]. As noted, Mr. Burger says we are now preparing to send a blast e-mail to the Section members to conduct an E-poll. The handout contains the proposed materials to be sent to the Section members. Mr. Burger says the Committee is still polishing those materials, but he seeks TEXCOM’s opinion on what the Committee has done so far. And today, Mr. Burger will seek TEXCOM’s permission to send out the blast e-mail, E-poll. Our next meeting is January 12, 2008. Mr. Burger would like to have the results of this E-poll before that meeting, because if the proposal is “dead”, then the Committee need not proceed with the final drafting work.

Turning to the handout materials, Mr. Burger acknowledges that it looks daunting; however, we can provide hyperlinks to facilitate reviewing of the materials. The E-poll is the last page. Mr. Burger is researching how to preclude a Section member from voting more than once.

Mr. Sallus says the materials are both well done and informative. But the vote calls for a vote up or down. If possible, could we divide the vote into sections to learn what members like or do not like? Mr. Burger responds that the E-poll asks few questions so that people will respond. If reviewing the materials and voting takes too much time, than Section members will not respond.

Obviously pleased, Mr. Zabronsky also observes that the materials are very impressive; he promptly moves that Mr. Burger be appointed to several more committees because he produces such impressive work.

Mr. Burger says we could announce the E-poll in the next issue of the *Quarterly*, where more people might read it, and then target the E-poll for December.

Chair Stern asks if we could select an initial test group, and, after their response, tweak the materials, if necessary. Mr. Sallus suggests that the San Fernando Valley and Beverly Hills Bar Associations might be available test groups. He asks the minimum number of responses we seek. Mr. Burger pauses thoughtfully. Then he recalls that, when CLRC polled Section members on the No Contest Clause, the survey drew only a small response. [Mr. Horton would later note the response was 5.4% of those surveyed; nevertheless, CLRC viewed 5.4% as a very meaningful response.] Ms. Orloff says that the highest poll, of which she is aware, was 5% on a Labor Section survey. Similarly, the State Bar just did a select survey of only 5,000 State Bar members

of a total 180,000 membership. Mr. Burger is asked what the Committee intends to present regarding elective administration in the *Quarterly*. And Mr. Burger responds it has not yet been fully determined. Mr. Hartog cautions that we are looking at an August 1, 2008 deadline to present proposed legislation to the Board of Governors. If the E-poll is delayed until March or April, then we may not hit that August 1<sup>st</sup> deadline. The Winter *Quarterly* will be out in mid-March 2008, and it may be too late for the Fall *Quarterly*. Catching Mr. Hartog's hint to move more quickly, TEXCOM ends this discussion and Mr. Horton moves for the EATE Committee to conduct the E-poll.

TEXCOM action: Aye – 21; no – 0; abstain – 2.

B. E-poll

Mr. Matulich asks if we have advised local bar associations that the E-poll is coming. Mr. Burger says “No,” but that is a good idea. Ms. Lodise says the Los Angeles area has its own listserve, and can be advised that the E-poll is coming, and Mr. Gaw proposes that we do a blast e-mail to let Section members know that the E-poll survey is coming. Chair Stern immediately approves that suggestion, and asking that the pre-survey blast e-mail be sent to Ms. Orloff.

VII. INCAPACITY

[LODISE]

A. Judicial Council Task Force Final Report

[Lodise]

Ms. Lodise says that the Judicial Council Task Force Final Report is long, and she uploaded it to our website. The Task Force is now disbanded, unless the Judicial Council has more work for it to do. In the final report, three main areas of concern included: education, best practices, and legislation. The Judicial Council will make rules regarding educational requirements for judges, etc. The “best practices” include things like standardized accounting, and more work will be done in this area.

Mr. Green went to the Judicial Council meeting when the Final Report was presented. A big issue was whether an attorney should be appointed for each proposed conservatee. This would be expensive. The Judicial Council approved the report. However, the Legislature will surely add additional requirements. Mr. Green understands that this could be the worst budget year in recent history, and he cannot imagine the Legislature requiring an attorney for each proposed conservatee.

B. Final Judicial Council Probate and Mental Health  
Committee Rules/Forms

[Corey]

Mr. Corey says the Judicial Council's proposals regarding rules and forms were approved on consent. And Mr. Green says that approval on consent is the next to last step before formal approval. There was some discussion at the meeting regarding education requirements, contrasting larger and smaller counties. Mr. Green says that he argued that educational requirements should not be reduced based upon locality, but he was not successful.

C. AB 1727 status (chaptered: ch. 553)

[Corey]

Having been chaptered, AB 1727 may now go off the agenda.

D. Professional Fiduciaries Bureau

[Matulich]

Handouts include SB 1550 (Cal. Stats. 2006, ch. 491) regarding the Professional Fiduciaries Act, as approved in September 2006, and a couple of related code sections. Mellonie Yang, a Special Consultant with the Bureau, was receiving conflicting comments regarding legislative intent; she sought input from Mr. Green, Ms. Lodise, and Ms. Tong. Ms. Lodise says the question boils down to who is a fiduciary.

Mr. Green says he was just working on draft statutory language for CJA re Agency regulations. Section 6500, subsection (f) defines "Professional Fiduciary" to include a person who acts for "more than three people or more than three families, or a combination of people and families that totals more than three, at the same time, who are not related to the professional fiduciary." Apparently, the regulations only look at the family of trustors, and do not include beneficiaries, and Mr. Green says the legislation also left off persons acting as guardian of the person.

Mr. Matulich reports Ms. Yang is reluctant to have regulations which are at variance with the law, irrespective of legislative intent. Chair Stern asks if anyone has considered a delayed effective date for the legislation. Mr. Green says, "Yes," but he hopes to have the regulations written in a way that works, and he hopes that Ms. Yang is not going to strictly apply the statute. In the meantime, Mr. Green is pressuring CJA to carry cleanup legislation. Mr. Matulich cautions that applications to be professional fiduciaries are going out at the end of December. The view is to qualify people as professional fiduciaries by July 1, 2008.

E. Bills to Watch:

- a. SB 241, chaptered: ch. 719 (funding for appointed counsel)

[Sallus]

Having been chaptered, SB 241 may go off the agenda.

- b. SB 800 (general care plans, notice or hearings prior to moving conservatees)

[Sallus]

Further work is necessary on SB 800.

- c. SB 573 Annuity standards

[Corey]

Mr. Corey says SB 573 is not dead, and we must continue to watch the bill, as well as SB 367. TEXCOM may have to change our position of support if the standards are watered down.

F. Probate Code section 1470 (Appointed counsel for  
already represented conservatees)

[Beltran; Lee]

This proposal to amend Probate Code section 1470 generated five handouts and quite extensive TEXCOM discussion; however, no issues were resolved; Chair Stern recognized additional time would be required as discussion began to consume the sparse available time for lunch. The handouts included:

- A draft memo to David Long in legislative proposal format re “Project No. 97-06 Appointment of Counsel for a Proposed Conservatee Who May Lack Capacity to Hire Counsel.
- Excerpt of TEXCOM Minutes in a 2002 meeting re this draft letter to David Long. Of interest it begins “Mr. Green urges that we approve this language because it has already been delayed long enough.” Mr. Oldman moves to approve the proposed legislation and then refer the report to the Incapacity Committee for revision in reworking some of the report’s language. This motion was unanimously approved.
- August 17, 2005 memo to TEXCOM from Mr. Stern transmitting the revised report, with some additional comments by new TEXCOM member Beltran to be resolved at the September 2005 meeting.
- October 1, 2007 memo from Mr. Beltran to Ms. Lodise, and
- October 28, 2007 memo from Ms. Lee to Ms. Lodise re Response to Reply to Analysis of Proposed Amendments to PC 1470.

Mr. Lodise says the handouts provide the background for this proposal, which was initiated ten years ago. Section 1470 allows a court to appoint counsel if the proposed conservatee does not have counsel. On occasion a proposed conservatee appears with counsel, but the court questions who hired that counsel. Some courts think they can appoint independent legal counsel for the proposed conservatee, but other courts do not. Accordingly, we generated this proposal.

In discussion, the Incapacity Committee asks what happens if counsel is “legitimate,” but the court wants to appoint additional counsel anyway? Mr. Beltran says that some courts appoint additional counsel to essentially act as a guardian ad litem. Mr. Beltran’s memo both recites the current TEXCOM proposal, and also proposes alternative amendments to Probate Code section 1470 (a).

The current TEXCOM proposal is as follows [bracketed words to be deleted, “underlined words to be added”]:

“1470 (a): The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines [the person is not otherwise represented by legal counsel and] that the appointment would be helpful to the resolution of the matter or is necessary to protect the person’s interests. The court may make such appointment of private legal counsel selected by the court notwithstanding the fact that the person may also be represented by other legal counsel.”

In his memo, Mr. Beltran next recites a personal horror story where he had personally represented an individual for over five years in various matters and later represented him in a petition to appoint a conservator for him. Nevertheless, over Mr. Beltran's objection and without chance for argument, the Judge appointed PVP counsel. Mr. Beltran says the underlying question is whether the "would-be attorney" is, in fact, representing the interests of the proposed conservatee.

Mr. Beltran previously proposed having a hearing for the court to examine the capacity of the proposed conservatee to contract; however, some objecting members said this would "pre-try" the case. In response, Mr. Beltran now proposes that the court simply employ a lesser standard to allow appointment where "it appears to the court" that such appointment is necessary.

Ms. Lee takes the floor and quickly references her five-page Response to Reply to Analysis of Proposed Amendments to PC 1470. Ms. Lee's memo is carefully crafted with a judicial-like analysis that even refers to the Benchguide section on Appointment of Counsel (section 300.28), which she and Commissioner Green undoubtedly treasure. At page three, Ms. Lee critiques the proposal's criteria "appear to the court," and asserts that this is a novel concept that does not appear anywhere else in conservatorship or even probate or trust practice. What does it mean? Certainly, it does not approach the capacity to contract in Probate Code section 1872 (a), and it is also different than a lack of capacity under section 811 et seq. Ms. Lee wonders if the court is to inquire, or whether a party would bear the burden of producing evidence. Also, how would this impact the presumption in section 810 that people have capacity? At page five of Ms. Lee's handout, she proposes adopting some fuzzy language [her comments] at the end of Mr. Beltran's proposal as follows: "...if the court determines that the representation of their interests otherwise would be inadequate."

Focusing, Ms. Lodise notes that we have the original proposal and Mr. Beltran's proposed revisions. The Committee simply decided to present these items to TEXCOM for review. Mr. Green suggests that Mr. Beltran use words such as "appears reasonably likely," which is the standard for a preliminary injunction. In practice, Mr. Green thinks these suggestions are in line with what courts are already doing, but the additional language is helpful. It should, in fact, be difficult for a court to decide if additional counsel is necessary. Mr. Sallus observes that Mr. Green has hit the point once again. The idea is comparable to obtaining a temporary restraining order in that another hearing is anticipated. Of course, the sole objective is for a proposed conservatee to receive adequate representation.

Mr. Hartog searches for a familiar fact pattern involving dueling attorneys. That is, the proposed conservatee has an attorney, but because of the conservatee's presence or comments, or perhaps because of the pleadings, or the proposed conservator's behavior, you wonder if the appearing attorney is truly advocating the proposed conservatee's interests. He asks how frequently this fact pattern arises. Mr. Green responds, saying Contra Costa County has approximately one-million in population and he sees this issue once a month. The more typical fact pattern involves new estate planning documents and the appearance of an attorney who represents the proposed conservatee, as well as his/her own work in revising the estate plan. If Mr. Green appoints an attorney, he does not excuse the other attorney. Instead, Mr. Green requires that the old attorney and the new attorney not duel but, instead, work together. This comment raises a few eyebrows.

A realist, Chair Stern now observes that this discussion will take more time. And Ms. Lodise notes that the Task Force may also address it. Nevertheless, discussion continues.

Mr. Zabronsky is obviously impressed with Ms. Lee's comments. He notes that the proposal does not remove the old attorney; it simply adds a new one. In contrast, adding a guardian ad litem does not work because the person has a right to oppose the conservatorship, which right could not be delegated to a guardian ad litem. Mr. Zabronsky simply suggests authorizing the court to appoint additional counsel when the court determines it may be helpful, without affecting the proposed conservatee's rights.

## **VIII. INCOME AND TRANSFER TAXES**

**[JAECH]**

Mr. Jaech reports that the Ninth Circuit found some low hanging fruit involving an FLP in the Bigelow case, where assets were fully includable in the estate. The focus was on a lack of non-tax benefit. A decedent transferred her assets to an FLP, and then could not survive on her remaining assets, without the help of others to pay her living expenses.

Regarding estate tax preparation, IRC section 6694 was added in May to impose penalties on tax return preparers. Formerly, such penalties applied only to income tax preparers, but now it applies to any tax preparer. Additionally, the old standard was "not frivolous." But the new standard requires a reasonable belief that the position is more likely than not to be validated. And the penalty is now 50% of the income derived from the preparation of the tax return.

Circular 230 mirrors the rules in the IRC. Perhaps, Mr. Jaech says, the estate tax return should no longer be viewed as an opening offer to the IRS. These new rules caused quite a stir at a recent ABA Tax Section meeting.

## **X. CEB**

**[GOOD]**

Offering no surprises, Ms. Good promises to recruit TEXCOM members as program attorneys in CEB's upcoming trust and estate programs. For fiscal year 2008-2009, Ms. Good asks for suggestions regarding needed programs.

## **XI. NCCUSL**

**[FITZPATRICK]**

Uniform National Guardianship Reciprocity issue

A handout includes: (i) the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("Act"), (ii). A summary of that Act, as well as discussion points which address key points and definitions in that Act, (iii) from the National College of Probate Judges, a Resolution in support of adopting that Act, and (iv) a two-page document entitled, "Why States Should Adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007).

Mr. Fitzpatrick notes that this Act involves adults only, and is procedural in nature. It follows the format of the Uniform Child Custody Act. It first deals with jurisdiction, or where the proceedings would be started. For example, assume that a son takes the mother to New York, but

then the sister spirits her away to Texas, where she could have control. There should be significant connections to the "Home State." The Act also provides for transfers between states.

For California, the Act is a proposal. Chair Stern asks the Incapacity Committee to review the Act and report in January. He notes that the Act is not terribly complex and the Incapacity Committee could report back regarding potential implementation in California. Of course, the Uniform Acts only have impact in jurisdictions which adopt them.

## **XII. NOMINATING COMMITTEE**

**[HARTOG]**

Mr. Hartog says that February 1<sup>st</sup> is the official deadline for applicants to apply for TEXCOM membership. It is a short time frame. He notes there are thirty-four TEXCOM members and advisors. Of those, twenty-two are male, and twelve are female. Approximately 50% of our members are from Districts 2 and 3, while Districts 1 and 6 generate no members. Sacramento is particularly well represented.

Mr. Hartog encouragingly states that we are all recruiting committee members. We need more females and members from Orange County, the Inland Empire, and the far North. Nevertheless, the most important factor is the candidate's quality. We need members who contribute. If you know a potential candidate in your area, let that candidate know of TEXCOM, or let Mr. Hartog know of the candidate. In encouraging candidates to apply, of course, we do not guarantee membership because, hopefully, many good candidates would apply.

## **XIII. EDUCATING SENIORS**

**[SALLUS]**

Mr. Sallus provides a one-page handout dated October 2, 2007 regarding "Educating Elders." It outlines ideas to discuss to increase the effectiveness of our Educating Seniors Project, including: (1) organizations we could approach; (2) possible symposiums we might hold, and (3) potential financial sponsors for these programs. Additionally, Mr. Sallus humbly asks for TEXCOM's other fresh thinking.

Mr. Sallus notes that, a few years ago, the Attorney General and State Bar sued a trust mill and reached a settlement agreement that provided funding to set up the Speakers Bureau. Where should we go from here? How do we expand beyond senior centers? In funding, we do have the settlement funds, but it is not the Getty Trust. In exploring possible program sponsors with State Bar staff, we might look to banks to provide support. He glances at Ms. Orloff, asking if we are violating any State Bar policies. She says "No," as to items (1) and (2).

Ms. Potts recalls that we have previously been involved with other groups such as the Department of Corporations, Department of Insurance, and others. She compliments Mr. Sallus on his good plan to get the Educating Seniors program back on track. She wonders if we should also consider elder law and elder abuse issues. Ms. Tong nods, saying the Department of Corporations is a good group to work with.

Chair Stern asks how many attorneys are on the Speakers Bureau list. And Ms. Orloff responds: 80-90. Mr. Sallus says the Speakers Bureau should be designed so that organizations invite the

speakers, and not vice versa. This approach would give us some control. We would not wish to have 80 to 90 freelance attorneys acting as our representatives. Ms. Orloff notes that we have a list of all senior centers in California. Chair Stern suggests that, with Ms. Lodise's approval, this could all be explored in an Incapacity Committee conference call.

#### **XIV. EDUCATION**

[ITO]

Yesterday, at our Thirty-First Annual Fall Program (aka Road Show) 128 attendees were present. Ms. Ito is pleased to say she received good reports on the programs. Always prepared, Ms. Ito then references a two-page handout entitled "Education Committee."

##### **A. Stand Alone programs – 2008 proposals**

[Ito]

Our deadline for submission of stand alone programs is November 15, 2007. Those proposals include:

##### **a. "Problems Fiduciaries Get Into"**

This course will focus on attacking both an estate plan and a trust administration, with a panel of Ms. Lodise, Charles Wolff, and Mary Gillick; the lunch keynote speaker will be Mr. Horton re No Contest Clauses; and the afternoon course will feature drafting around problems and conducting trust administration to avoid the problems, discussed in the morning. This panel includes Ms. Orvell, Richard Kinyon, and S. Andrew Pharies.

##### **b. Public Benefits and Special Needs Trusts**

This program will discuss drafting SNT's and the fundamentals of SSI and Medi-Cal planning.

- c. Conservatorships From Start to Finish**
- d. Property Through the Generations – 2 day taxation program  
(for consideration perhaps for 2009)**
- e. Tax One-Day as alternative in 2008.**

This tax program alternative could have topics including recent updates in taxation as well as drafting specific tax clauses, such as tax allocation, Crummey powers, powers of appointment, etc.

##### **f. International (2009)**

At the memo's end, Ms. Ito identifies key issues for TEXCOM discussions. Ms. Ito's topics do fire up TEXCOM discussion. Mr. Corey would favor having two one-day tax programs, one in 2008, and one in 2009. Ms. Good says CEB is doing a new book on Special Needs Trusts, which should be out in February or March 2008. Mr. Gaw reminds TEXCOM that, in 2009, we could do a specialization program; in the last specialization program, we were over subscribed. Ms. Potts says tax programs are beneficial, and there are few good tax programs in our area.

Chair Stern asks how many would prefer having a conservatorship program, as opposed to a tax program?

TEXCOM action: An informal showing of hands clearly favors tax.

TEXCOM next launches into a discussion of possible program dates. But after some discussion, Chair Stern wisely delegates to Ms. Ito the task of choosing dates and cities.

B. 2007/2008 Winter SEI [Ito]

Ms. Ito says she has prepared five programs for our Winter SEI program.

C. Suggestions for 2008 Monterey Annual Meeting [Ito]

Ms. Ito says January 31<sup>st</sup> is the deadline to specify our 2008 annual meeting programs.

D. Your Legal Rights [Ehrman]

Mr. Ehrman says the December topic for this “Your Legal Rights” radio program involves professional fiduciaries.

## **XV. LEGISLATION**

**[REGGIARDO/COREY]**

### **1. Introduction to Saul Berkovitch – New Procedures for 2008**

A one-page handout is entitled TEXCOM Legislative Function Transition Summary (November 3, 2007). It is based on an October 30, 2007 meeting involving Larry Doyle, Anthony Williams, Saul Berkovitch, Ed Corey, and Sil Reggiardo regarding the transition of certain legislative counsel functions after Larry Doyle’s departure [from State Bar Chief Legislative Advocate to practice with Ms. Potts’ group.] It includes discussion of: (1) Legislative Progress and Deadlines, (2) Bill Tracking, (3) Hearings and Working with Legislators/Staff, and a Summary conclusion. That Summary conclusion is essentially that Mr. Doyle’s job will be divided into two parts, one handled by Mr. Berkovitch and the other by Mr. Williams. Mr. Doyle will remain available and is anxious to help us; but he also needs to make his transition.

Mr. Berkovitch is introduced. He notes that things will be different, following Mr. Doyle’s 18 years of great service. Mr. Berkovitch will remain in San Francisco; however, the State Bar will have on the ground in Sacramento a person roaming the halls and meeting with legislative staff. As noted, Mr. Doyle’s job will be separated into two pieces: (i) in Sacramento, a contract lobbyist will be on the ground, and (2) for the State Bar, Mr. Berkovitch’s role will be to handle questions and give approvals. Mr. Berkovitch has been with the State Bar since 2001, working with various committees and committee rules. Prior to 2001, he practiced in civil litigation for 13 years.

Mr. Corey notes that legislative position papers would go to Mr. Berkovitch, but the “on the ground” lobbyist in Sacramento would deal with day-to-day activities. Mr. Berkovitch nods, saying we will remain flexible in working through these changed procedures. And Mr. Reggiardo expresses confidence in these developments.

2. Timeline for TEXCOM legislative proposals-  
BOG review of proposals [Jim Brown]

Chair Stern asks Mr. Brown about developments emanating from the *Hume* case. Mr. Brown says our legislative proposal would not require a conservator to inventory or protect out of state property; instead, the conservator would identify such property in the schedules. It is viewed as overruling the *Hume* case. Chair Stern says the climate in the Legislature is to protect conservatees. Mr. Green notes that CJA would support our proposal; a California conservator cannot be responsible for out of state property. Chair Stern asks Mr. Brown and Mr. Sallus to coordinate efforts on this proposal.

3. Priorities for Bills Presently in Legislature

Mr. Doyle notes that on January 7, 2008, the Legislature reconvenes in the second year of a two-year session. Bills must be out of the house of origin by the end of January, or they are dead.

3. Mandatory procedures re legislative proposals – n.r.
4. Online Bill Tracking legislative information:  
[www.leginfo.ca.gov/](http://www.leginfo.ca.gov/)

**IMPORTANT GUIDELINES:**

- Please use approved format for legislative proposals.
- Please use approved comment form for legislation comments.
- Always write to Saul Berkovitch, not directly to a member of Legislature or legislative staff.
- Confirm testimony needs with Legislation Chair.
- If you agree to testify, be there unless otherwise notified.

**XVI. QUARTERLY – n.r. [HAND]**

**XVII. TRUST & ESTATE ADMINISTRATION - n.r. [BURGER]**

**XVIII. CLRC [HORTON]**  
A. No Contest Clause Study [Horton]

Mr. Horton provides four handouts for TEXCOM’s discussion on the No Contest Clause, which is currently pending before the CLRC: (i) Mr. Horton’s Report on CLRC No Contest Clause Statute; (ii) CLRC’s First Alternative Discussion Draft – September 14, 2007; (iii) October 3, 2007 e-mail from Brian Hebert to Mr. Horton; and (iv) a one-page short series of questions regarding indirect contests as an abstract proposal/or considerations regarding existing law.

The First Alternative Discussion Draft (9-14-07) was generated by Mr. Hebert of CLRC, but has not yet been considered by CLRC.

Probate Code section 21305 (a) identifies actions which do not constitute a contest unless expressly identified in the no contest clause as a violation of the clause, including (i) creditor's claim, (ii) action to determine the character, title, or ownership of property; and (iii) a challenge to the validity of an instrument or document other than the instrument containing the no contest clause. Section 21300 provides definitions of "contest," "direct contest," "indirect contest," and "no contest clause."

Mr. Horton provides some interesting background. CLRC last studied enforcement of no contest clauses in 1990. CLRC Memorandum 2005-47, p. 3. With TEXCOM's input, what emerged from that study is the basis of our current law: (i) enforcement of no contest clauses without an exception for probable cause; and (ii) availability of declaratory relief so the beneficiary could obtain a court determination in advance of filing a petition that arguably would trigger a forfeiture.

But the passage of time brought change. In 1990, the Probate Departments in California mainly administered decedent's estates. Today, probate litigation is much more common, reflecting not only a growth in population and wealth, but also longer life spans. Longer life spans have led to longer periods of mental decline, in which it becomes difficult to fathom the extent to which others have influenced an elderly transferor. Family ties have continued to weaken as children relocate to seek career opportunities. Longer second marriages often reduce the expectancy of children to the benefit of their step-parent and step-siblings. In addition, the variety of non-marital relationships have increased.

Courts responded to the increase in probate litigation by construing no contest clauses to greatly expand their scope. For example, no contest clauses apply to any contest that would "thwart" a decedent's integrated estate plan. *Burch v George* (1994) 7 Cal.4<sup>th</sup> 246-263; see also *Genger v Delsol* (1997) 56 Cal. App. 4<sup>th</sup> 1410. In turn, attorneys brought more declaratory relief petitions to determine whether a proposed direct contest would violate a no contest clause. Appellate opinions involving such declaratory relief petitions have little precedential value. Whether a proposed action violates a no contest clause "depends upon the circumstances of the particular case and the language used." *Burch*, supra, 7 Cal 4<sup>th</sup> at 254-255; see also *McIndoe v Olivios* (2005) 132 Cal App. 4<sup>th</sup> 483, 487.

What was good policy in 1990 is no longer good policy today. Between 1990 and 2004, the Legislature did make significant changes regarding enforcement of no contest clauses. For example, section 21305 was added in 2000, and amended in 2002, to specifically list proceedings that do not violate a no contest clause as a matter of public policy. In 2005, the State Bar proposed legislation that would abolish enforcement of no contest clauses and substitute fee-shifting as a penalty, if a contest was brought without probable cause. This proposal received a cool reception from both the Assembly and the Senate Judiciary Committees which, instead, directed CLRC to again study the issue and report back to the Legislature in 2008. The opponents of no contest clause reform frame the issue as balancing the public policy of

testamentary freedom against the value of protecting beneficiaries from poorly drafted no contest clauses. In contrast, Mr. Horton says the issue, properly framed, is whether no contest reform can be accomplished in a way that does not unduly impinge on testamentary freedom.

The CLRC recently conducted a survey of probate practitioners regarding the viability of the no contest clause law as currently framed. Providing a meaningful number for the survey, 5.4% of the people surveyed responded that enforcement of no contest clauses in California is a significant problem. The CLRC has again undertaken a review of no contest clauses in California. However, in CLRC's 2007 No Contest Clause Study, CLRC is caught in a cross fire between: (i) those for whom the primary value is the right of clients to condition their gifts in a way that they see fit so long as it does not violate public policy, and (ii) those who are willing to constrain testamentary freedom, in order to eliminate the expense and delay of declaratory relief litigation.

Mr. Hebert asked if we could compromise. Present at the October 26<sup>th</sup> CLRC meeting were Charles Collier, a former member of both TEXCOM and CLRC, who favors repeal of declaratory relief; David Nelson, who favors strong no contest clause enforcement, and Mr. Horton. During the meeting, it became obvious that CLRC was not likely to propose eliminating all indirect contests. The meeting concluded with CLRC instructing staff to draft a proposal that would retain indirect contests for forced elections by allowing no contest clauses to apply to property disputes and to creditor's claims.

Mr. Horton feels the need for instruction. The CLRC next meets in December, and TEXCOM does not meet until January. Accordingly, Mr. Horton wants to focus on issues anticipated to be considered at CLRC's December meeting. Importantly, the CLRC will propose legislation in this area, perhaps as early as January 2008. Mr. Horton turns to his one-page handout. It has two titles: (i) Support Or Oppose Two Types Of Indirect Contests As An Abstract Proposal, listing three questions and (ii) Support Or Oppose Two Types Of Indirect Contests If the Alternative Is Existing Law, listing two questions. Mr. Horton says that, although more questions exist, he will be content if we provide guidance on these five questions [however, as it turned out, these questions were never considered by TEXCOM].

Mr. Zabronsky turns to a handout – the October 30, 2007 e-mail from Brian Hebert to Mr. Horton. Mr. Hebert says he has listened to the recording of CLRC's October 2007 meeting. He believes, unofficially, that CLRC's direction to him was to prepare a draft recommendation, for consideration in December, that would:

- (1) Allow for enforcement of a no contest clause against a direct contest or an indirect contest of the types described in 21305 (a).
- (2) Preserve declaratory relief, but only for the purposes of determining whether action would be subject to a no contest clause as an indirect contest under the 21305 (a) language.

Mr. Zabronsky observes that Mr. Hebert has done a good job. He has reined in the no contest clause in a difficult area involving fraud, and allowed it to operate in the spousal election contest. He considers the initial language of section 21305 (a) which states: "For instruments executed on or after January 1, 2001, the following actions do not constitute a contest unless expressly

identified in the no contest clause as a violation of the clause: [creditor's claim proceedings, property ownership issues, and challenges to documents other than the instrument containing the no contest clause] (emphasis added).

Mr. Zabronsky thinks we should add language that “expressly identified” is to be construed specifically. He says the wisest thing is to preserve declaratory relief for the question of whether an item is “expressly identified.” But, playing the spoiler, Mr. Green says that the proposed proposal is illusory. In practice, the distinction between direct and indirect contests blurs in significance. Any requirement for declaratory relief will not be workable. But Mr. Hartog agrees with Mr. Zabronsky. Assume these facts: T loans money to a child, and then T falls into mental decline. Next, T is unduly influenced by a person and changes a trust document. Section 21320 does not work in that situation, which raises a *Burch v. George* problem.

Mr. Zabronsky ventures that there is, indeed, a distinction between a direct and an indirect contest. If you assert the instrument is invalid, that is a direct contest. But to pursue an indirect contest, a contestant needs potential declaratory relief.

Mr. Sallus bluntly acknowledges that he and Mr. Hartog differ theoretically on the no contest clause. But even recognizing the difference of opinion, here we are dealing with square pegs and round holes. We previously told the Legislature to eliminate the no contest clause. The CLRC proposal we are discussing has not been reviewed by the respective Judiciary Committees. He wonders if they will be receptive. Mr. Sallus then initially moves to disapprove the handout, which is CLRC's First Alternative Discussion Draft. But Mr. Horton responds that this draft has never officially been before the CLRC. Mr. Horton included it simply because it is the closest example to what he thinks the CLRC will be considering. But irrespective of that point, Mr. Horton says the CLRC will draft a statute to obtain no contest clause enforcement against indirect contests, such as those in 21305 (a).

Mr. Sallus responds by moving that we reject any CLRC draft that introduces or retains declaratory relief in the law.

TEXCOM action: Aye – 10; nay – 8; abstain – 1.

Mr. Corey worries that, in taking such position, we are not working with CLRC. But Mr. Sallus fires back that CLRC has not given us anything to work with. We are essentially voting without anything in front of us. Mr. Matulich says he voted against the motion because by it, we say we will not consider anything that allows for declaratory relief. This is a problem. We have never told CLRC exactly what we do want. But responding, Chair Stern echoes Mr. Sallus' comment that CLRC has not given us a real choice.

Ms. Lawson provides perspective. Over the years, all she has ever heard is that we do not want declaratory relief proceedings. This vote is consistent with the historical perspective. People should be able to do what they wish to do with their own property; but, it must be “their” property. Accordingly, the immovable object has met the irresistible force. And we seek to resolve this dilemma with a “probable cause” requirement. Mr. Horton responds that, if the CLRC allows indirect contests, then the no contest clause would not be applicable if probable

cause exists. But Mr. Zabronsky ventures that the probable cause concept does not work with forced elections; with a forced election, there is probable cause. And the CLRC will either keep forced elections, or it will not. Mr. Horton recalls that the CLRC vote regarding the forced election was a 3 - 2 vote. Is our bottom line to tell CLRC that probable cause should apply to all attempts to apply a no contest clause to a pleading?

Mr. MacDonald asserts that *Burch v George* is correctly decided. We should not allow post-death dissolution proceedings. We should enforce the no contest clause against direct and indirect contests alike, with a probable cause exception as to all, except proceedings to determine the character, title, or ownership of property. A motion is made: if the statute allows the no contest clause to apply to indirect contests, then it should apply only to indirect contests filed without probable cause.

TEXCOM action: Aye – 14; nay – 6; abstain – 0.

Ms. Lodise suggests that if Mr. Horton receives the official CLRC proposal, then he could e-mail it to TEXCOM, and we could comment.

B.	Care Custodian Task Force – n.r.	[Horton]
C.	New CLRC Projects – n.r.	[Horton]

**XIX. ETHICS – n.r.** [LODISE]

**XX. CONFERENCE OF DELEGATES – n.r.** [HENDEN]

**XXI. NEW BUSINESS**

Chair Stern notes that Mr. Corey will replace him on the Judicial Council Probate and Mental Health Advisory Committee. Chair Stern also notes that Mr. Wallet has resigned from TEXCOM to meet the demands of his practice.

**XXII. COMING ATTRACTIONS**

## **NEXT TEXCOM MEETING**

**January 12, 2008**

**9:30 am-3:30 pm**

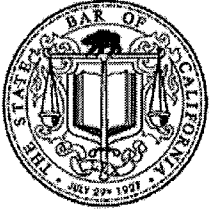
**LAX MARRIOTT**

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Leonard W. Pollard II (Reporter)

## To Do List

- |       |                         |   |
|-------|-------------------------|---|
| p. 4  | Litigation Committee    | Review T&E Committee report re attorney's fees and comment in January.  |
|       | TEXCOM                  | If you have an Alert item, for the Quarterly, send it to Ms. Henden or Mr. Kosloff.   |
| p. 4  | Technology              | Ms. Orloff to survey internet connection cost.  |
| p. 6  | M& M Committee          | Membership & Marketing Committee is to obtain a list of executive directors (leaders) of local bar associations from LA Daily Journal and send to Ms. Orloff. She will send those leaders blast e-mails for our educational programs, asking that they forward the information to local bar membership. |
| p. 8  | Ms. Lodise<br>Mr. Gaw   | TEXCOM should advise that the E-poll on elective administration is coming.<br>- Ms. Lodise – LA listserve<br>- Mr. Gaw – blast e-mail to Section members to be sent to Ms. Orloff.  |
| p. 13 | Incapacity Com.         | Incapacity Committee is to review NCCUSL's Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act for possible adoption in California and report in January.  |
| p. 14 | Ms. Lodise              | Would Ms. Lodise like to explore having an Incapacity Committee conference call with Mr. Sallus regarding educating seniors?  |
| p. 16 | Mr. Brown<br>Mr. Sallus | To coordinate efforts to respond to BOG comments on our <i>Hume</i> proposal.   |



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### HOTEL INTERNET CHARGES IN CONFERENCE ROOMS

A very few hotels now offer wireless internet throughout their facilities. However, none of these are currently located in convenient "airport" locations. A number of hotels offer this access in their lobbies and public areas. Again, however, this does not help us since our meetings take place in private conference areas.

Typically, guest room rates range from \$9.99 per day to \$14.99 per day (a marked contrast to the rates being charged for the conference facilities in all cases).

#### **SFO Westin Hotel**

\$350 per day (for up to 30 connections)

#### **OAK Airport Hilton**

\$300 for first connection; \$125 each per additional connection

\*Free wireless available in main lobby area

#### **LAX Marriott**

\$350 for first connection; \$75 each per additional connection

\*Free wireless available in some public areas of the hotel

Note that the SFO Westin is a notable "exception" when it comes to cost. Most airport hotels are charging rates similar to those being charged at the OAK Hilton and the LAX Marriott.

TEXCOM might consider having meetings at law firm offices where internet is offered for no charge. However, it is often difficult to find firm space that can accommodate 40-44 hollow square.

# TRUSTS AND ESTATES SECTION

## Financial Summary for Period Ending October 31, 2007

	2007 As of 10/31	2007 Budget	2006 As of 10/31	2006 As of 12/31
<b><u>CONSOLIDATED REVENUES</u></b>				
Membership Revenue	\$424,462	\$360,000	\$397,481	\$400,768
Interest Revenue	\$21,636	\$6,800	\$19,414	\$24,513
Miscellaneous Revenue**	\$114,718	\$50,000	\$133,531	\$150,687
<i>Includes Seminar and Grant Revenues</i>				
<b>TOTAL</b>	<b>\$560,816</b>	<b>\$416,800</b>	<b>\$550,426</b>	<b>\$575,968</b>
<b><u>CONSOLIDATED EXPENDITURES</u></b>				
Employee Expenses	\$1,101	\$500	\$345	\$1,173
Travel/Catering Expenses	\$141,499	\$150,000	\$121,544	\$166,713
<i>(Includes meeting rooms + catering)</i>				
Supplies/Postage/Telephone**	\$9,355	\$7,600	\$18,178	\$21,084
Furniture/Equipment	\$6,666	\$4,500	\$5,880	\$6,511
<i>(Includes copier expenses)</i>				
Professional Services	\$17,014	\$20,000	\$6,568	\$9,463
Printing/Outside Other Services	\$38,304	\$60,000	\$32,074	\$60,331
Internal Allocation	\$127,150	\$174,200	\$104,253	\$218,683
<i>(Includes Overhead Assessment)</i>				
<b>TOTAL EXPENSES</b>	<b>\$341,089</b>	<b>\$416,800</b>	<b>\$288,842</b>	<b>\$483,958</b>

## **BREAKDOWN OF EXPENDITURES**

As of Oct-07	Section Admin.	AM, SEI & Online	Executive Committee	Retreat	Cmt Reimb & Sr Project	Quarterly	Programs*	TOTAL
Revenues	\$459,087	\$2,540	\$0	\$0	\$235	\$6,080	\$92,874	\$560,816
Expenses	\$130,992	\$21,927	\$56,972	\$35,336	\$1,635	\$31,151	\$63,076	\$341,089
Total 2006 Expenses	\$223,125	\$21,026	\$64,268	\$53,590	\$3,985	\$54,237	\$63,727	\$483,958

## **Summary of Total Available Assets as of October 31, 2007**

Current Remaining Funds	\$219,727
Balance of Assessment for 2007	\$127,150
Balance	\$92,577
2006 Carry Forward	\$345,871
Total Funds (Current + Reserves)	\$438,448



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

**LEGISLATIVE PROPOSAL (T&E- ):**  
**COLLECTION OF PERSONAL PROPERTY OF ESTATE BY SISTER STATE  
PERSONAL REPRESENTATIVE WITHOUT ANCILLARY ADMINISTRATION**

**TO:** Saul Berkovitch, Staff Attorney, State Bar Office of Governmental Affairs

**FROM:** Peter Stern, Chair, Executive Committee  
Richard Burger, Advisor, Executive Committee, and Chair, Trusts and Estates  
Administration Committee  
Trusts and Estates Section, California State Bar

**DATE:** January 7, 2008

**RE:** Collection Of Personal Property Of Estate By Sister State Personal Representative  
Without Ancillary Administration

Statutory Framework - Division 7, Part 13, Chapter 3 - New §§12580-12589.1

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### **SECTION ACTION AND CONTACT(S):**

Date of Approval by Section Executive Committee/Standing Committee: \_\_\_\_\_

Approval vote: For \_\_\_\_\_ Against \_\_\_\_\_

Date of Approval by Section Committee/Subcommittee *(if applicable)*: \_\_\_\_\_

Approval vote: For \_\_\_\_\_ Against \_\_\_\_\_

Contact	Section/Committee Legislative Chair
Name: Kay Henden	Name: Silvio Reggiardo III
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**DIGEST:** This proposal would add a series of Probate Code sections allowing a sister-state Personal Representative to collect personal property in excess of the existing limit using an affidavit procedure similar to that covering smaller estates.

**PURPOSE:**

**1). What is the state of existing law (statutory and/or case law) on the issue?**

Under present law (see Estate of Glassford (1952) 114 Cal.App.2d 181), a sister-state Personal Representative is required to file for ancillary probate in order to collect personal property in California having a value greater than that permitting collection by affidavit under Prob Code 13100 et seq. (currently \$100,000).

**2). What is the problem with the existing law?**

If personal property is located in California and also in a sister state, a sister-state Personal Representative is required to maintain two separate actions to administer the property, one in the domiciliary state, the other in California. While a separate action might be justified if the property owned in California was real property, there is no rationale for requiring such an action for personal property. The additional action therefore represents a needless burden on the estate.

**3). How does this proposal remedy the problem?**

This proposal permits the sister-state Personal Representative to take custody of the California personal property by means of a simple affidavit, thereby consolidating the decedent's property in the sister state for efficient administration.

**SIMILAR LEGISLATION:** *No prior legislation has addressed this issue.*

**PENDING LITIGATION:** *No pending litigation would be impacted by this legislation if enacted.*

**LIKELY SUPPORT & OPPOSITION:**

<u>Support</u>	<u>Why?</u>
Banks and trust companies; trust and estate attorneys	Process would simplify administration and clarify legal requirements for transfer of personal property out of state
<u>Oppose</u>	
None known	

**FISCAL IMPACT:** No public funds will be required to implement this legislation.

**GERMANENESS:**

This matter requires the special knowledge, training, experience or technical expertise of the section because it relates to resolution of trust, probate and estate matters which are the special purview of the section.

**TEXT OF PROPOSAL:**

See attached.

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**Chapter 3.**  
**COLLECTION OF PERSONAL PROPERTY OF ESTATE BY SISTER STATE**  
**PERSONAL REPRESENTATIVE WITHOUT ANCILLARY ADMINISTRATION**

**Revised/Added Section 12580 et seq**

**Revision #7**

**10/29/07**

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**12580. Affidavit Procedure for Larger Estates**

If the value of a nondomiciliary decedent's property in this state exceeds the dollar amount specified in Section 13100, and if 40 days have elapsed since the death of the decedent, a sister state personal representative may, without petitioning for ancillary administration, use the procedure described in Chapter 3, commencing with Section 12581 of Part 13 of Division 7 to collect personal property of the decedent.

**12581. Affidavit or Declaration Required**

(a) To collect money, receive tangible personal property, or have evidences of a debt, obligation, interest, right, security, or chose in action transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

- (1) The decedent's name.
- (2) The date and place of the decedent's death.
- (3) "At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration."
- (4) "No proceeding (including an application or petition for same) is now being or has been conducted in California for administration of the decedent's estate."

(5) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.

(6) "The affiant or declarant is the duly-appointed Personal Representative of said decedent in the state where said decedent was domiciled."

(7) "No other person has a superior right to the interest of the decedent in the described property."

(8) "The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant."

(9) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one personal representative executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) If the particular item of property to be transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration shall satisfy the requirements both of this section and of Section 13106.5 (relating to Recordation of Affidavit Where Lien Has Been Recorded).

(d) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

(e) A certified copy of the affiant's Letters Testamentary, Letters of Administration, or the equivalent document in the state where the decedent was domiciled shall be attached to the affidavit or declaration. Said certified copy shall be certified within 60 days of the presentation to the holder of the property.

## **12582. Attaching Evidence of Ownership to Affidavit**

Probate Code section Prob C 13102, relating to presentation of evidence of ownership to the holder of property prior to collection under this part, shall be applicable to collection of personal property under Section 12580 et seq.

## **12583. Transfer**

(a) If the requirements of Sections 12580 to 12582, inclusive, are satisfied:

(1) The sister state personal representative is entitled to have the property described in the affidavit or declaration paid, delivered, or transferred to it.

(2) A transfer agent of a security described in the affidavit or declaration shall change the registered ownership on the books of the corporation from the decedent to the sister state personal representative.

(b) If the holder of the decedent's property refuses to pay, deliver, or transfer any personal property or evidence thereof to the sister state personal representative within a reasonable time, the sister state personal representative may recover the property or compel its payment, delivery, or transfer in an action brought for that purpose against the holder of the property. If an action is brought against the holder under this section, the court shall award reasonable attorney's fees to the person or persons bringing the action if the court

finds that the holder of the decedent's property acted unreasonably in refusing to pay, deliver, or transfer the property to them as required by subdivision (a).

#### **12584. Acquittance**

(a) If the requirements of Sections 12580 to 12582, inclusive, are satisfied, receipt by the holder of the decedent's property of the affidavit or declaration constitutes sufficient acquittance for the payment of money, delivery of property, or changing registered ownership of property pursuant to this chapter and discharges the holder from any further liability with respect to the money or property. The holder may rely in good faith on the statements in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

(b) If the requirements of Sections 12580 to 12582, inclusive, are satisfied, the holder of the decedent's property is not liable for any taxes due to this state by reason of paying money, delivering property, or changing registered ownership of property pursuant to this chapter.

#### **12585. Where Property Claimed in Affidavit is Subject of Pending Action Which Decedent Was a Party**

Where the money or property claimed in an affidavit or declaration executed under this chapter is the subject of a pending action or proceeding in which the decedent was a party, the sister state personal representative of the decedent shall, without procuring letters of administration or awaiting probate of the will, be substituted as a party in place of the decedent by making a motion under Article 3 (commencing with Section 377.30) of Chapter 4 of Title 2 of Part 2 of the Code of Civil Procedure. The sister state personal representative shall file the affidavit or declaration with the court when the motion is made. For the purpose of Article 3 (commencing with Section 377.30) of Chapter 4 of Title 2 of Part 2 of the Code of Civil Procedure, a sister state personal representative of the decedent who complies with this chapter shall be considered as a successor in interest of the decedent.

#### **12586. Requirements for Use of Affidavit Procedure**

(a) The procedure provided by this chapter may be used only if no proceeding for the administration of the decedent's estate is pending or has been conducted in this state.

(b) Payment, delivery, or transfer of a decedent's property pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate.

##### **12586.1 Restoration to Estate**

(a) Subject to the provisions of this section, if proceedings for the administration of the decedent's estate are commenced in this state, and the personal representative later requests that the property be restored to the estate, the sister state personal representative to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

- (1) The restitution of the property to the estate if the sister state personal representative still has the property, together with (A) the net income the sister state

personal representative received from the property and (B) if the sister state personal representative encumbered the property after it was delivered or transferred to the sister state personal representative, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the estate of the fair market value of the property if the sister state personal representative no longer has the property, together with (A) the net income the sister state personal representative received from the property and (B) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property paid, delivered, or transferred to the sister state personal representative under this chapter, less any liens and encumbrances on the property at that time.

(b) If any person fraudulently secures the payment, delivery, or transfer of the decedent's property under this chapter, such person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, determined as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to such person under this chapter, less the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount: (1) paid by the sister state personal representative to satisfy unsecured debts of decedent as provided in 12587 or (2) administrative expenses paid or distributions made in good faith and pursuant to the law of the sister state.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

(f) In the case of a nondomiciliary decedent, restitution under this section shall be made to the estate in an ancillary administration proceeding.

#### **12587. Liability of Sister State Personal Representative to Whom Payment, Delivery or Transfer of Decedent's Property is Made**

A sister state personal representative to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable, to the extent provided in Section

12590, for the unsecured debts of the decedent. Any such debt may be enforced against the sister state personal representative in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the sister state personal representative may assert any defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure applies in an action under this section.

#### **12588. Costs and Fees of Public Administrator or Coroner**

(a) A public administrator who has taken possession or control of property of a decedent under Article 1 (commencing with Section 7600) of Chapter 4 of Part 1 of Division 7 may refuse to pay money or deliver property pursuant to this chapter if payment of the costs and fees described in Section 7604 has not first been made or adequately assured to the satisfaction of the public administrator.

(b) A coroner who has property found upon the body of a decedent, or who has taken charge of property of the decedent pursuant to Section 27491.3 of the Government Code, may refuse to pay or deliver the property pursuant to this chapter if payment of the reasonable costs of holding or safeguarding the property has not first been made or adequately assured to the satisfaction of the coroner.

#### **12589. Chapter Not Applicable to Real Property**

The procedure provided in this chapter may not be used to obtain possession or the transfer of real property.

##### **12589.1. Scope of Chapter**

The procedure provided in this chapter is in addition to and supplemental to any other procedure for (1) collecting money due to a decedent, (2) receiving tangible personal property of a decedent, or (3) having evidence of ownership of property of a decedent transferred. Nothing in this chapter restricts or limits the release of tangible personal property of a decedent pursuant to any other provision of law.

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#### **SECTION GIVEN BELOW FOR REFERENCE ONLY**

#### **12590. Jurisdiction over Sister State Personal Representative. [NO CHANGE]**

A sister state personal representative or foreign nation personal representative submits personally in a representative capacity to the jurisdiction of the courts of this state in any proceeding relating to the estate by any of the following actions:

- (a) Filing a petition for ancillary administration.

(b) Receiving money or other personal property pursuant to Chapter 3 (commencing with Section 12570). Jurisdiction under this subdivision is limited to the amount of money and the value of personal property received.

(c) Doing any act in this state as a personal representative that would have given this state jurisdiction over the personal representative as an individual.

## MEMORANDUM

**To:** TEXCOM  
**From:** Richard Burger, on behalf of the Trusts and Estates Administration  
Committee  
**Date:** 1/7/2008  
**Re:** Proposed changes to Probate Code §§ 16061, 16064

---

### CHANGE TO SECTION 16061

The Administration Committee has reviewed its proposal for a change to Section 16061 (presented at the 9/30/2007 meeting) and has reaffirmed its proposed change. Existing Section 16061 creates the impression that a "report" is synonymous with an "account," which we believe is wrong. In this context we believe that a report contains that information which is relevant to the specific beneficiary's interest in the trust. In some cases, that could include substantially the same as the information as that found in an account, but in others it might not be.

We believe that under the current statutory scheme, there are three levels of information which a trustee must provide:

1. The duty under Section 16060 to keep the trust beneficiaries "reasonably informed of the trust and its administration." This is a fundamental duty of the trustee, and should not be disturbed.
2. The duty under Section 16061 to provide a "report" as requested by the beneficiary. Our goal is to clarify that a "report" is not a specific format, document or data set, but instead is that information which is relevant to the beneficiary's interest in the trust.
3. The duty to "account" to current beneficiaries under Section 16062.

Our proposed change to 16061:

16061. Except as provided in Section 16064, on reasonable request by a beneficiary, the trustee shall provide the beneficiary with a report of requested information ~~about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust~~ pertaining to the administration of the trust that is relevant to the beneficiary's interest, such as information about the assets, liabilities, receipts and disbursements of the trust, the acts of the trustee, the terms of the trust, and any other information reasonably requested by the beneficiary that is relevant to the beneficiary's interest.

## CHANGE TO SECTION 16064

Once Section 16062 has been changed so that it is clear that "report" and "account" are not necessarily synonymous, Section 16064 must be addressed, since "report" and "account" are used inconsistently in that section.

Here's existing 16064:

16064. The trustee is not required to report information or account to a beneficiary in any of the following circumstances:

(a) To the extent the trust instrument waives the report or account, except that no waiver described in subdivision (e) of Section 16062 shall be valid or enforceable. Regardless of a waiver of accounting in the trust instrument, upon a showing that it is reasonably likely that a material breach of the trust has occurred, the court may compel the trustee to report information about the trust and to account.

(b) In the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked.

(c) As to a beneficiary who has waived in writing the right to a report or account. A waiver of rights under this subdivision may be withdrawn in writing at any time as to the most recent account and future accounts. A waiver has no effect on the beneficiary's right to petition for a report or account pursuant to Section 17200.

(d) Where the beneficiary and the trustee are the same person.

We have discussed two distinctly different ways to address this inconsistency.

One would allow a waiver of the requirement to report. We call this the "pro-settlor" version. (Note that even if the obligation to report were waived in the trust instrument, this would not negate the trustee's basic duty under Section 16060 to keep the trust beneficiaries "reasonably informed of the trust and its administration.")

The other alternative would allow a waiver of accounts, but not reports. We call this the "pro-beneficiary" version.

Here are the two different versions:

### **Pro-settlor version:**

16064. The trustee is not required to report information or account to a beneficiary in any of the following circumstances:

(a) To the extent the trust instrument waives the report or account, except that no waiver described in subdivision (e) of Section 16062 shall be valid or enforceable.

Regardless of a waiver of accounting or reporting in the trust instrument, upon a showing that it is reasonably likely that a material breach of the trust has occurred, the court may compel the trustee to report information about the trust and to account.

(b) [no change]

(c) As to a beneficiary who has waived in writing the right to a report or account. A waiver of rights under this subdivision may be withdrawn in writing at any time as to the most recent account or report and future accounts and reports. A waiver has no effect on the beneficiary's right to petition for a report or account pursuant to Section 17200.

(d) [no change]

**Pro-beneficiary version:**

16064. The trustee is not required to ~~report information or~~ account to a beneficiary *described in subdivision (a) of Section 16062* in any of the following circumstances:

(a) To the extent the trust instrument waives the ~~report or~~ account, except that no waiver described in subdivision (e) of Section 16062 shall be valid or enforceable. Regardless of a waiver of accounting in the trust instrument, upon a showing that it is reasonably likely that a material breach of the trust has occurred, the court may compel the trustee to ~~report information about the trust and to~~ account.

(b) [no change]

(c) As to a beneficiary who has waived in writing the right to ~~a report or an~~ account. A waiver of rights under this subdivision may be withdrawn in writing at any time as to the most recent account and future accounts. A waiver has no effect on the beneficiary's right to petition for ~~a report or an~~ account pursuant to Section 17200.

(d) [no change]

We would like TEXCOM's input on Section 16064. Assuming Section 16060 is changed as we are proposing, should we:

- Adopt the pro-settlor version of Section 16064?
- Adopt the pro-beneficiary version of Section 16064?
- Leave Section 16064 alone?

## MEMORANDUM

**To:** TEXCOM  
**From:** Richard Burger, on behalf of the Trusts and Estates Administration Committee  
**Date:** 1/12/2008  
**Re:** Progress Report (or lack thereof) on possible Section 850 Judicial Council Form

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The Administration Committee was asked to develop suggestions for a possible Judicial Council form for "Heggstad" or "Section 850" petitions (i.e., petitions which request the court to find that an asset which is titled in the decedent's name is actually an asset of the decedent's trust). Such petitions are increasingly common and reportedly they vary considerably, perhaps in part because there is no Judicial Council form.

During our discussion of this matter, the Committee quickly reached a dead end, and is now coming back to TEXCOM for direction.

We first thought that a Judicial Council form should be under Probate Code § 850, except that it should be limited to situations where a trustee claims ownership of property which is in the name of the settlor of the trust. The other situations which are included in § 850 (where there are interested parties other than trustees and beneficiaries, and those that relate to probate estates, guardianships, conservatorships) didn't seem to fit the typical petition we believed a Judicial Council form should address.

But under § 850, notice must be by personal service. This makes sense where there's an adversarial dispute over property ownership, but seems unnecessary where there is no dispute among beneficiaries of the trust and the beneficiaries of the decedent's estate. Section 17203 seems to properly prescribe notice for § 17200 petitions – trustees and beneficiaries get regular (mailed) notice, but any other persons whose interests would be affected by the petition receive personal service. Because of the different way notice is handled under § 850 and § 17203, we decided that § 17200 is the more appropriate section for these petitions, and thus for a Judicial Council form.

But then we realized that we have a bigger problem with this project: the widely divergent approaches that different probate courts take to such petitions. As we compared stories from different counties we have experienced first-hand, we found that some courts are very liberal in granting such orders (e.g., where there is a general assignment of assets to the trust), and others are much more strict (e.g., approving petitions only where there is a clerical or typographical defect in the instrument of transfer).

We do not believe that we should propose a Judicial Council form which would favor one legitimate application of the law over a very different – but also legitimate – view. A Judicial Council form should help the petitioner and the court, by organizing the facts necessary to obtain the relief being sought. The form should follow well-established law, but it should not necessarily take a position on an issue that judges around the state have not yet resolved.

Following are some examples of fact patterns which might generate different rulings, depending on which county the petition was heard. Assume the decedent had a revocable trust,

but title to the asset, the decedent's residence, is in the decedent's name – not in the trust – at the time of his death.

1. The residence is listed on Exhibit A of the trust, but the decedent never formally transferred title.
2. Same as # 1, but title to the residence was transferred to the trust by a deed which was recorded shortly after the trust was signed. Two years later, while refinancing the house, the decedent transferred title to himself and executed a new deed of trust. The decedent never transferred title back to the trust.
3. The asset is not listed on Exhibit A, and no deed was ever executed, but there is a general assignment which assigns "all of my right and title to all of my property, both real and personal."
4. Same as # 3, but the decedent did not own the residence when the trust was created, and the general assignment assigns "all right and title to all of my assets, both real and personal, whether owned by me now or acquired by me in the future."
5. The trust contains no general assignment, but decedent's child signs a declaration that the decedent told him "Don't worry. I've got a trust and everything I have is in it, and it all goes to you when I croak." The decedent's child cites Probate Code § 15200(a), which provides that a trust may be created by "a declaration by the owner of the property that the owner holds the property as trustee." The decedent's will was executed on the same date as the trust and "pours over" the decedent's estate to the trust.
6. Assume that in # 5, the decedent did not execute a pourover will, and either (1) the decedent's son is the only heir, or (2) that the decedent had two children but specifically disinherited the non-petitioning child in his trust.

We believe that deciding which boxes to include on a Judicial Council form (e.g., "Settlor's oral declaration that property was part of trust estate") would be controversial among many judges. This suggests to us that, if anything is to be done, something other than a Judicial Council form would be appropriate at this time.

We think that if a change is appropriate, it should be an addition to § 17200, rather than a new Judicial Council Form. If TEXCOM believes that change is needed, we would suggest that § 17200 include a more specific reference to a "trustee who has a claim to real or personal property, title to or possession of which is held by another." If § 17200 was amended to include this "850-like" language, we would have two Probate Code sections with some overlap. It would be necessary to retain § 850 for trusts, since it allows "any interested person" to file a petition, and only a trustee or beneficiary may file a petition under § 17200.

If TEXCOM wishes, we will continue to work on this project, but its focus will shift to a statutory change. Otherwise, we believe the matter should be dropped at this time.

## INVITATION TO COMMENT

Title	Probate: Graduated Filing Fee in Decedents' Estates (amend rules 7.151 and 7.552 of the California Rules of Court and adopt rule 7.552.5; revise form DE-111).
Summary	The proposed amendments to rules 7.151 and 7.552, adoption of rule 7.552.5, and revision of the <i>Petition for Probate</i> (form DE-111) would implement changes made by recent legislation in the way that the graduated filing fee in decedents' estates will be determined and paid in estates commenced after December 31, 2007.
Source	Probate and Mental Health Advisory Committee Hon. Don Edward Green, Chair
Staff	Douglas C. Miller 415.865.7535; douglas.miller@jud.ca.gov
Discussion	<p>A decedent's estate proceeding is commenced by the filing of a <i>Petition for Probate</i> (form DE-111). Government Code section 70650 prescribes a filing fee for commencement of the proceeding based on the value of the estate. Because the fee is payable at commencement of the case and the value of the estate is not known or finally determined until well after that date, the value of the estate must be estimated for filing fee purposes.</p> <p>Government Code section 70650 requires the petitioner who files the first <i>Petition for Probate</i> in the proceeding to pay the graduated filing fee before the assets of the decedent are available for the purpose. In most cases the first petition results in the appointment of a personal representative, the decedent's executor or administrator, who collects the decedent's property and pays the expenses of administration from that property. These payments routinely include reimbursement of the filing fee paid by the successful petitioner when the petition was filed.</p> <p>Sometimes, however, the personal representative of the estate is appointed on a second or subsequent petition. Rule 7.151 of the California Rules of Court deals with that situation. The rule requires the personal representative of the estate to reimburse the unsuccessful first petitioner the amount of the graduated filing fee paid by that petitioner in excess of the minimum amount required by the statute, and prescribes a procedure for the payment.</p>

As noted above, the graduated filing fee is payable based on an estimate of the value of the estate at the time the case is commenced. Sometimes the estimate on which the fee is based is higher or lower than the final appraised value of the estate, determined months after the estimate was made. Rule 7.552 of the California Rules of Court prescribes the procedure that must be followed to finally fix the proper filing fee based on the actual appraised value of the estate and to provide for either a refund if the estimated value of the estate is higher than the appraised value or an additional payment if the estimated value is less than the appraised value.

#### *AB 1248*

A new statute effective January 1, 2008, will amend Government Code section 70650 to change the manner in which the graduated filing fee is paid.<sup>1</sup> Section 70650(b) has been changed by AB 1248 to provide that (1) only the minimum fee of \$320 is payable when a *Petition for Probate* is filed; (2) the graduated filing fee is to be determined based on the actual appraised value of the estate; and (3) the graduated filing fee above the minimum will be fully payable by the personal representative of the estate no later than the time the final account and petition for its settlement or a petition for final distribution is filed, without regard to whether the personal representative was appointed on a first-filed or subsequently-filed petition, under rules adopted by the Judicial Council.

#### *Rule 7.151*

This rule would be amended to limit its application to estates commenced on or after August 18, 2003, the effective date of the statute that enacted the graduated filing fee,<sup>2</sup> and before January 1, 2008, the effective date of AB 1248. There will be no need to require reimbursement of the graduated filing fee paid by first-filers by successful subsequent-filers for estates commenced after the latter date because the graduated fee above the minimum will be paid in such estates only by the personal representative. The rule cannot simply be repealed because the reimbursement procedure remains fully

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<sup>1</sup> Stats. 2007, ch. 738 (AB 1248), § 30. The amount of the graduated filing fee, last changed in 2005 (Stats. 2005, ch. 75, § 61) has not been changed.

<sup>2</sup> Stats. 2003, ch. 159 (AB 1759), §§ 9, 27

applicable to estates commenced on or after August 18, 2003 and before January 1, 2008. Many of these estates remain open.

#### Rule 7.552

This rule would be modified to expressly make it applicable only to estates commenced between August 18, 2003 and January 1, 2008 for the same reasons as rule 7.151: Adjustments in the graduated filing fee required by the rule because of inaccurate estimate of an estate's value will be required only for those estates in which the fee above the minimum was payable before the actual appraised value of the estate is known.

#### Rule 7.552.5

This proposed new rule would address estates commenced after December 31, 2007. The rule would continue to require a statement showing the calculation of the graduated filing fee based on the total appraised value of the estate to be shown in the final account or petition for final distribution. However, unlike current rule 7.552(b)–(d), rule 7.552.5 would no longer require the estimated fee calculations and the refund or additional payment provisions.

#### *Petition for Probate* (form DE-111)

The *Petition for Probate* would be revised to delete the current item 3 on page 1, which is the estimated value of the estate for filing fee purposes. Items 4–9 of the current form would be renumbered accordingly.

The text of the proposed amended rules 7.151 and 7.552 and new rule 7.552.5, and a copy of the proposed revised form DE-111 are attached.

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Attachments

## Rule Proposal

Rules 7.151 and 7.552 of the California Rules of Court would be amended, and rule 7.552.5 would be adopted, effective July 1, 2008, to read:

**Rule 7.151. Reimbursement of graduated filing fee by successful subsequent petitioner**

**(a) Duty to reimburse**

In decedents' estates commenced on or after August 18, 2003 and before January 1, 2008, a general personal representative appointed on a Petition for Probate that was not the first-filed petition for appointment of a general personal representative in the proceeding must reimburse the unsuccessful petitioner on the first-filed petition for a portion of the filing fee paid by the unsuccessful petitioner.

**(b) Amount of reimbursement**

The reimbursement required under this rule is in the amount of:

- (1) The filing fee paid by the unsuccessful petitioner in excess of the filing fee that would have been payable on that date for a Petition for Probate of an estate valued at less than \$250,000, less
- (2) The unpaid amount of any costs or sanctions awarded against the unsuccessful petitioner in favor of the party that sought the personal representative's appointment in the proceeding.

**(c) When reimbursement payable**

The personal representative must make the reimbursement payment required under this rule in cash and in full no later than the date the Inventory and Appraisal is due under Probate Code section 8800(b), including additional time allowed by the court under that provision.

**(d) Payment from estate funds**

The reimbursement payment under this rule is an authorized expense of administration and may be made from estate funds without a prior court order.

1   **(e) Receipt from unsuccessful petitioner**

2  
3       The unsuccessful petitioner must give it's a signed receipt for the  
4       reimbursement payment made under this rule.  
5

6   **(f) Personal representative's right to claim refund**

7  
8       A personal representative that is required to but fails to make the  
9       reimbursement payment under this rule may not claim a refund of the  
10      difference between the estimated filing fee and the corrected filing fee under  
11      rule 7.552(c).  
12

13   **(g) Petitioner on dismissed petition for probate**

14  
15      A petitioner that is eligible to receive a refund of filing fee for a dismissed  
16      Petition for Probate under rule 7.552(d) is not an unsuccessful petitioner  
17      within the meaning of this rule.  
18

19   **Rule 7.552. Graduated filing fee adjustments for estates commenced on or**  
20   **after August 18, 2003 and before January 1, 2008**

21  
22      This rule applies to decedents' estate proceedings commenced on or after  
23      August 18, 2003 and before January 1, 2008. Rule 7.552.5 applies to  
24      decedents' estate proceedings commenced after December 31, 2007.  
25

26   **(a) Separate schedule for graduated fee information**

27  
28      The final account or report filed in every decedent's estate proceeding  
29      commenced on or after August 18, 2003 and before January 1, 2008, must  
30      include a separate schedule showing the following information:  
31

- 32      (1) The name of each petitioner on the first-filed Petition for Probate in the  
33          proceeding;  
34  
35      (2) The date the first-filed Petition for Probate was filed in the proceeding;  
36  
37      (3) The estimated value of the estate shown in item 3, "estimated value of  
38          the estate for filing fee purposes," of the first-filed Petition for Probate  
39          in the proceeding;  
40  
41      (4) The filing fee paid by or for the petitioner on the first-filed Petition for  
42          Probate in the proceeding;  
43

- 1 (5) The following information from the Inventories and Appraisals filed in  
2 the proceeding:  
3  
4 (A) The date each partial, supplemental, final, or corrected Inventory  
5 and Appraisal was filed;  
6  
7 (B) The total appraised value of the assets of the estate shown in each  
8 filed partial, supplemental, or final Inventory and Appraisal;  
9  
10 (C) Changes in the appraised value of the assets of the estate shown in  
11 each filed corrected Inventory and Appraisal; and  
12  
13 (D) The combined total appraised value of the estate shown in all filed  
14 partial, supplemental, final, and corrected Inventories and  
15 Appraisals;  
16  
17 (6) A statement of the amount of filing fee that would have been payable  
18 under Government Code section 2682770650, as amended effective on  
19 the date the first-filed Petition for Probate was filed in the proceeding,  
20 if the total actual appraised value of the estate had been used as the  
21 estimated value for filing fee purposes (the “corrected filing fee”);  
22  
23 (7) Calculation of the difference between the estimated filing fee paid  
24 under Government Code section 2682770650 on filing the first Petition  
25 for Probate in the proceeding (the “estimated filing fee”) and the  
26 “corrected filing fee,” as determined under (6) and subdivision (e) of  
27 this rule; and  
28  
29 (8) The following information concerning filing fee reimbursement  
30 payments made by a personal representative in the proceeding under  
31 rule 7.151:  
32  
33 (A) The amount of each payment;  
34  
35 (B) The date each payment was made; and  
36  
37 (C) The name, address, and telephone number of the payee and of any  
38 attorney of record for the payee in the proceeding.  
39  
40 (b) **If estimated filing fee less than corrected filing fee**  
41  
42 If the estimated filing fee is less than the corrected filing fee, as determined  
43 under (a) and (e), the petition filed with the final account or report must

1 allege that the difference between them has been paid to the clerk of the  
2 court. A copy of the clerk's receipt for the payment, and, if applicable, a  
3 receipt or other evidence satisfactory to the court of payment of the  
4 reimbursement required under rule 7.151, must be attached as an exhibit to  
5 the account or report.

6  
7 **(c) If estimated filing fee more than corrected filing fee**

- 8  
9 (1) Subject to the provisions of rule 7.151, if the estimated filing fee is  
10 more than the corrected filing fee, as determined under (a) and (e), the  
11 personal representative of the decedent's estate is eligible under this  
12 subdivision to receive a refund of the difference between them, without  
13 interest.  
14  
15 (2) The personal representative must apply to the court for the refund, in  
16 accordance with the court's local rules and practices for such payments.  
17  
18 (3) Unless authorized to retain a reserve against closing expenses that  
19 expressly is to include the court's refund payment after the personal  
20 representative's discharge, the personal representative must not apply  
21 for a discharge while an application for refund of filing fee under this  
22 subdivision is pending and before the court's refund payment is  
23 received.  
24

25 **(d) Refund on voluntarily dismissed Petition for Probate**

- 26  
27 (1) A petitioner that files a Petition for Probate on or after August 18,  
28 2003, and voluntarily dismisses the petition at any time within 90 days  
29 after it is filed and before an order granting or denying the petition is  
30 filed, is eligible under this subdivision to receive a refund, without  
31 interest, of all filing fees paid in excess of the filing fees that would  
32 have been payable on the original filing date for a petition for probate  
33 of an estate valued at less than \$250,000.  
34  
35 (2) The petitioner on a dismissed Petition for Probate under (1) must apply  
36 to the court for the refund, in accordance with the court's local rules  
37 and practices for such payments.  
38

39 **(e) Additional adjustment in corrected filing fee in insolvent estates**

40  
41 If the expenses of administration must be proportionately reduced under  
42 Probate Code section 11420 because the property in the estate is insufficient  
43 to pay them in full, the court may approve a determination of the corrected

1 filing fee under this rule that reflects the proportionate reduction of those  
2 expenses, provided that the corrected filing fee may not be reduced below  
3 the minimum fee required by Government Code section ~~26827~~70650 on the  
4 date the estimated fee was paid.

5  
6 **(f) Sample schedule of graduated fee information**

7  
8 The schedule of graduated fee information required under (a) may be  
9 substantially as follows:

10 SCHEDULE \_\_\_\_

11  
12 Graduated Filing Fee Information

13  
14 1. The first-filed Petition for Probate in this proceeding was filed on  
15 [Date] by [name of each petitioner].

16  
17 2. The estimated value of the estate for filing fee purposes shown on the  
18 first-filed Petition for Probate in this proceeding is \$ \_\_\_\_.

19  
20 3. The filing fee paid by or for the petitioners on the first-filed Petition for  
21 Probate in this proceeding was \$ \_\_\_\_.

22  
23 4. The following Inventories and Appraisals have been filed in this  
24 proceeding:

25 Type	Date Filed	Appraised Value
26 [Partial no. ____]	[09/30/09]	\$
27 [Partial no. ____]		\$
28 Final		\$
29 [Supplemental]		\$
30 [Correcting]		\$ (or \$) ____
31 Total appraised value of estate:		\$ ____

32  
33 5. Corrected Filing Fee:

34  
35 Total appraised value of estate: \$

36  
37 Filing fee as of the date in 1 above, based on  
38 total appraised value of estate: \$

39  
40 Adjustment to reflect proportional reduction of  
41 expenses of administration for insolvent estate  
42 under Cal. Rules of Court, rule 7.552(e): (\$ \_\_\_\_)

43 Corrected Filing Fee: \$ \_\_\_\_

1 6. Difference between estimated and corrected filing fee:

2  
3 Estimated filing fee from 3 above: \$

4  
5 Corrected filing fee from 5 above: (\$ \_\_\_\_\_)

6 Difference: \$ (or \$) \_\_\_\_\_

7  
8 7. Filing fee reimbursements under rule 7.151:

9  
10 **Payee(s)** **Date Paid** **Amount**  
11 [Name, address, and telephone [10/25/09] \$  
12 number of each payee and attorney of record in the proceeding]  
13  
14

15 **Rule 7.552.5 Graduated filing fee statements for decedents' estates**  
16 **commenced after December 31, 2007**

17  
18 This rule applies to decedents' estates commenced after December 31, 2007.

19  
20 **(a) Separate schedule for graduated fee information**

21  
22 The final account or report or petition for final distribution filed in every  
23 decedent's estate proceeding commenced after December 31, 2007, must  
24 include a separate schedule showing the following information:

25  
26 (1) The date the first-filed *Petition for Probate* was filed in the proceeding;

27  
28 (2) The following information from the *Inventories and Appraisals* filed in  
29 the proceeding:

30  
31 (A) The date each partial, supplemental, final, or corrected *Inventory*  
32 *and Appraisal* was filed;

33  
34 (B) The total appraised value of the assets of the estate shown in each  
35 filed partial, supplemental, or final *Inventory and Appraisal*;

36  
37 (C) Changes in the appraised value of the assets of the estate shown in  
38 each filed corrected *Inventory and Appraisal*; and

39  
40 (D) The combined total appraised value of the estate shown in all filed  
41 partial, supplemental, final, and corrected *Inventories and*  
42 *Appraisals*.

1 **(b) Adjustment in corrected filing fee in insolvent estates**

2  
3 If the expenses of administration must be proportionately reduced under  
4 Probate Code section 11420 because the property in the estate is insufficient  
5 to pay them in full, the court may approve a determination of the graduated  
6 filing fee under this rule that reflects the proportionate reduction of those  
7 expenses, provided that the corrected filing fee may not be reduced below  
8 the minimum fee required by Government Code section 70650 on the date  
9 the estate was commenced.

10  
11 **(c) Sample schedule of filing fee information**

12  
13 The schedule of graduated fee information required under (a) may be  
14 substantially as follows:

15 SCHEDULE

16  
17 Graduated Filing Fee Information

18  
19 1. The first-filed *Petition for Probate* in this proceeding was filed on  
20 [Date] by [name of each petitioner].

21  
22 2. The following *Inventories and Appraisals* have been filed in this  
23 proceeding:

Type	Date Filed	Appraised Value
[Partial no. ]	[09/30/09]	\$
[Partial no. ]		\$
Final		\$
[Supplemental]		\$
[Correcting]		\$ (or \$)
Total appraised value of estate:		\$

31  
32 3. Graduated Filing Fee:

33  
34 Total appraised value of estate: \$

35  
36 Filing fee as of the date in 1 above, based on  
37 total appraised value of estate: \$

38  
39 Adjustment to reflect proportional reduction of  
40 expenses of administration for insolvent estate  
41 under Cal. Rules of Court, rule 7.552.5(b): (\$ )  
42 Corrected Filing Fee: \$  
43

## **Item W08-04 Response Form**

**Title:** Probate: Graduated Filing Fee in Decedents' Estates (amend rules 7.151 and 7.552 of the California Rules of Court and adopt rule 7.552.5; revise form DE-111)

- ☐ Agree with proposed changes
- ☐ Agree with proposed changes **if modified**
- ☐ **Do not agree** with proposed changes

Comments: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Name: \_\_\_\_\_ Title: \_\_\_\_\_

Organization: \_\_\_\_\_

- ☐ Commenting on behalf of an organization

Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Please write or fax or respond using the Internet to:

**Address:** Ms. Camilla Kieliger,  
Judicial Council, 455 Golden Gate Avenue,  
San Francisco, CA 94102

**Fax:** (415) 865-7664    **Attention:** Camilla Kieliger

**Internet:** <http://www.courtinfo.ca.gov/invitationstocomment/commentform.htm>

**DEADLINE FOR COMMENT: 5:00 p.m., Friday, January 25, 2008**

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

*Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee.  
All comments will become part of the public record of the council's action.*

# MEMORANDUM

To: Trusts & Estates Administration Committee  
CC: Dave Gaw  
From: Jim Lamping  
Re: Powers of Appointment and Probate Code Section 16061.7  
Date: November 27, 2007

## ISSUES:

1. Is there a duty to serve the notice described in Probate Code section 16061.7 where a settlor irrevocably exercises or releases a power of appointment under an existing self-settled irrevocable trust?
2. Is there a distinction between an irrevocable inter vivos and a testamentary exercise or release of a power of appointment?
3. What modifications to existing law would be appropriate to address these issues?
4. Where the Probate Code section 16061.7 notice is served after the sixty day period required by subdivision (f) of that statute, does the statute of limitations to file a contest begin to run?

## CONCISE ANALYSIS:

1. Current law is not entirely clear regarding whether there is a duty to serve the notice described in Probate Code section 16061.7 where a settlor irrevocably exercises or releases a power of appointment under an existing self-settled irrevocable trust.
2. Even if one is inclined to believe that Probate Code section 16061.7 does apply to a post-mortem exercise or release of a power of appointment, it does not appear that this statute would apply to an irrevocable inter vivos exercise or release.
3. A new subdivision under Probate Code section 16061.7 may be appropriate to clarify the notice requirements where a settlor irrevocably exercises or releases a power of appointment under an existing self-settled irrevocable trust.
4. Inasmuch as Probate Code section 16061.8 refers only to notice that is "served pursuant to this chapter" as triggering the statute of limitations, it is not entirely clear whether notice served after the expiration of the sixty day deadline will start the running of the statute of limitations. An amendment to Probate Code section 16061.8 would be appropriate to resolve this ambiguity.

## DISCUSSION:

- A. Example. Suppose that Settlor creates an irrevocable trust, reserving a power of appointment which may be exercised either inter vivos or upon his death. The trust provides that its assets will be divided equally between Settlor's two children upon Settlor's death in the absence of the exercise of the power of appointment. Settlor is unmarried has two children, Cain and Able. A 16061.7 notice would not be required upon formation of the trust. Probate Code section 16061.7 subdivision (a) provides:

“(a) A trustee shall serve a notification by the trustee as described in this section in the following events:

- (1) When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust.
- (2) Whenever there is a change of trustee of an irrevocable trust. The duty to serve the notification by the trustee is the duty of the continuing or successor trustee, and any one cotrustee may serve the notification.”

The trust in this example was not a revocable trust that became irrevocable due to the death of the settlor, nor has a change of trustees occurred. Consequently, Probate Code section 16061.7 subdivision (a) has no application in this context. This is almost a matter of common sense. The protections of Probate Code section 16061.7 are not really needed where a settlor is alive and competent to make a gift through an irrevocable trust. Probate Code section 16061.7 should not be amended to require notice in this situation.

- B. Factual Variation Number One: Irrevocable Inter Vivos Exercise or Release of Power of Appointment. Settlor irrevocably exercises his power of appointment to immediately appoint all of the assets of the irrevocable trust to Able. All assets of the trust are immediately transferred to Able. Again, the trust in this example was not a revocable trust that became irrevocable due to the death of the settlor, nor has a change of trustees occurred. Consequently, Probate Code section 16061.7 subdivision (a) has no application in this context. This is analogous to a settlor making an inter vivos gift from a revocable trust. Probate Code section 16061.7 should not be amended to require notice in this situation.
- C. Factual Variation Number Two: Revocable Exercise of Testamentary Power of

Appointment. Settlor executes a testamentary power of appointment appointing all assets of the irrevocable trust to Able upon Settlor's death. If Settlor chooses to do so, he may execute a new testamentary power of appointment changing the plan of distribution upon Settlor's death. Settlor is still alive. Again, the trust in this example was not a revocable trust that became irrevocable due to the death of the settlor, nor has a change of trustees occurred. Consequently, Probate Code section 16061.7 subdivision (a) has no application in this context. While Settlor has exercised the power of appointment, he retains the ability to revoke the power of appointment. This is analogous to Settlor retaining the right to amend the plan of disposition under a revocable trust. Probate Code section 16061.7 should not be amended to require notice in this situation.

- D. Factual Variation Number Three: Operation of Testamentary Power of Appointment at Death. Settlor executes a testamentary power of appointment appointing all assets of the irrevocable trust to Able upon Settlor's death. Settlor dies. If Settlor was acting as trustee, his death would result in a change of trustees. Consequently, notice would be required under Probate Code section 16061.7 subdivision (a)(2). Assuming that Settlor was not acting as trustee, the issue is whether the trust in this example was a revocable trust that became irrevocable due to his death.

From a strictly technical standpoint, the trust was irrevocable at the time of its creation. However, the reality is that Settlor retained the right to amend the plan of disposition until his death through the exercise of the testamentary power of appointment. Probate Code section 16061.7 subdivision (a)(1) states that notice is required where "a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust." It was only upon the death of Settlor that the plan of distribution became "... irrevocable because of the death of one or more of the settlors of the trust." Arguably, the plan of distribution falls within the definition of "a revocable trust or any portion thereof," even though it is technically exercised through a separate document, the power of appointment. This interpretation is supported by Probate Code section 16060.5, which states in relevant part:

"'Terms of the trust' also includes any document irrevocably exercising a power of appointment over the trust or over any portion of the trust which has become irrevocable."

If one is willing to assume that notice is required under Probate Code section 16061.7, Cain would be entitled to notice by virtue of his status as an heir. (Prob. Code § 16061.7 subd. (b)(2).) It is less clear whether a non-heir initially named as a beneficiary would be entitled to notice if their interest has been divested through the exercise of a power of appointment.

Probate Code section 16061.7 subdivision (b)(1) provides that notice must be served upon "[e]ach beneficiary of the irrevocable trust or irrevocable portion of the trust ...". As discussed in the October 29, 2007 meeting, an amendment to this statute is

appropriate to clarify that notice should be required only to beneficiaries under the "terms of the trust," and not to beneficiaries deleted by complete restatements. Such an amendment to the statute would further bolster the argument that the exercise of a testamentary power of appointment under an irrevocable trust would trigger the notice requirement because the exercise would occur in a "document irrevocably exercising a power of appointment" "because of the death of one or more of the settlors of the trust." (Probate Code §§ 16060.5, 16061.7(a)(1).)

While this interpretation is implicit within the proposed language of Probate Code section 16061.7, it would be preferable to specifically articulate the circumstances which require notice with respect to the exercise of a testamentary power of appointment. This may require the addition of a new Probate Code section 16061.7(a)(3). A proposal for a revised version of Probate Code section 16061.7 subdivisions (a) and (b) follows:

"(a) A trustee shall serve a notification by the trustee as described in this section in the following events:

(1) When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust.

(2) Whenever there is a change of trustee of an irrevocable trust. The duty to serve the notification by the trustee is the duty of the continuing or successor trustee, and any one cotrustee may serve the notification.

(3) *Whenever a power of appointment retained by a settlor is effective or lapses upon the death of a settlor with respect to an inter vivos trust which was or purported to be irrevocable upon its creation.*

(b) The notification by the trustee required by subdivision (a) shall be served on each of the following:

(1) Each beneficiary *named in the terms of the trust (as "terms of the trust" is defined in Section 16060.5) of with respect to the irrevocable trust or irrevocable portion of the trust, subject to the limitations of Section 15804.*

(2) Each heir of the deceased settlor, if the event that requires notification is the death of a settlor or irrevocability within one year of the death of the settlor of the trust by the express terms of the trust

because of a contingency related to the death of a settlor.

(3) If the trust is a charitable trust subject to the supervision of the Attorney General, to the Attorney General.”

It could be argued that the exercise of a testamentary power of appointment by someone other than a settlor should also trigger notice under Probate Code section 16061.7. The exercise of a testamentary power of appointment generally requires the same testamentary capacity as a will. (Prob. Code §§ 612(a), 625.) As a result, there is some logic to the position that the same notice should be required as with a testamentary transfer through a will or trust. However, requiring notice upon the exercise of a power of appointment by a third party may be taking matters too far. (This would require adjustment to the above proposed language if it were adopted.)

- E. Factual Variation Number Four: Disinheriting a Child Through an Irrevocable Trust. Settlor does not name both children as beneficiaries the irrevocable trust. Rather, Cain uses undue influence to convince Settlor (who is suffering from dementia) to create an irrevocable trust naming only Cain as the remainder beneficiary. While Settlor’s testamentary capacity is marginal, Settlor expresses that he does not want to disinherit Able. Cain convinces Settlor to sign the irrevocable trust by assuring Settlor that he can always change the plan of distribution using the power of appointment. Settlor reluctantly signs the irrevocable trust and transfers all of his assets to it because Cain has advised Settlor regarding the horrors of the probate administration process, especially where there is no will. Cain then locks Settlor in his bedroom and uses medications as a chemical restraint against Settlor. Settlor dies without exercising the power of appointment.

If Settlor had created a revocable trust, clearly Able would be entitled to notice as an heir under Probate Code section 16061.7 subdivisions (a)(1) and (b)(2). As discussed in Factual Variation Number Three, Settlor’s retention of a power of appointment is tantamount to retaining the power to revoke the portion of the trust containing its dispositive provisions. While it could be argued that this triggers the requirement for notice under Probate Code section 16061.7, the law is not entirely clear on that point. Cain could argue that the trust was irrevocable from its inception, and therefore the trust did not become “irrevocable because of the death of one or more of the settlors of the trust.” Under Factual Scenarios Three or Four, Cain arguably will have evaded the notice requirement under Probate Code section 16061.7 by having Settlor sign a trust that was irrevocable in form only.

A significant distinction between Factual Scenarios Three or Four is that Able is not a “beneficiary” under the “terms of the trust” in Factual Scenario Four. Able’s ability to obtain any information regarding the trust may therefore be much more limited under Factual Scenario Four. Probate Code section 16061 provides:

“Except as provided in Section 16064, on reasonable request by a *beneficiary*, the trustee shall provide the beneficiary with a report of

information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust." (Emphasis added.)

The term "beneficiary," "[a]s it relates to a trust, means a person who has any present or future interest, vested or contingent." (Prob. Code § 24 subd. (c).) Able would not be a beneficiary if he were unconditionally disinherited in the trust. Even a "beneficiary" requesting information is only entitled to information "relevant to the beneficiary's interest." A beneficiary divested by a power of appointment therefore may only be entitled to a copy of the trust and the document exercising the power of appointment. Under Factual Scenario Four (where Able was not initially named as a beneficiary) Able would not have a right to this limited information, even upon request.

There exists a potential for abuse in permitting the evasion of the notice requirements under Probate Code section 16061.7 through the creation of an ostensibly irrevocable inter vivos trust with a settlor retained power of appointment. Probate Code section 16061.7 should be amended to close this loophole.

- F. Starting the Statute of Limitations More than Sixty Days after Death. It is not entirely clear whether the statute of limitations to contest a trust can ever begin where notice is served more than sixty days after the date of death. Probate Code section 16061.7 subdivision (f) provides that the notice required under Probate Code section 16061.7 must be served within sixty days after the date of death:

"The notification by trustee shall be served not later than 60 days following the occurrence of the event requiring service of the notification by trustee, or 60 days after the trustee became aware of the existence of a person entitled to receive notification by trustee, if that person was not known to the trustee on the occurrence of the event requiring service of the notification. If there is a vacancy in the office of the trustee on the date of the occurrence of the event requiring service of the notification by trustee, or if that event causes a vacancy, then the 60-day period for service of the notification by trustee commences on the date the new trustee commences to serve as trustee."

The current version of Probate Code section 16061.8 provides:

"No person upon whom the notification by the trustee is served **pursuant to this chapter** may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later." (Emphasis added.)

Where the notification is not served within sixty days after the date of death,

arguably it has not been served "pursuant to this chapter." Thus, it could be argued that the statute of limitations never begins to run. While no appellate cases have addressed this issue, it would be appropriate to amend the statute to resolve this concern before that becomes necessary. A proposed revision to Probate Code section 16061.8 is as follows:

"No person upon whom the notification by the trustee is served pursuant to this chapter *whether the notice is served on him or her within or after the time period set forth in subsection (f) of Section 16061.7* may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later."

**IRS Circular 230 Disclosure:** To ensure compliance with the requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

## Memorandum

To: Members of Administration Committee, Trusts and Estates Section

From: Michael C. Gerson

Subject: May a Power of Attorney Grant an Agent the Power to Make a Will? Should it be able to do so?

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Prob. Code §4265 provides:

A power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal's Will.

Prob. Code §4101 provides:

- (a) Except as provided in subdivision (b), the principal may limit the application of any provision of this division by an express statement in the power of attorney or by providing an inconsistent rule in the power of attorney.
- (b) A power of a attorney may not limit either the application of a statute specifically providing that it is not subject to a limitation in the power of attorney or a statute concerning any of the following:
  - (1) Warnings or notices required to be included in a power of attorney.
  - (2) Operative dates of statutory enactments or amendments.
  - (3) Execution formalities.
  - (4) Qualification of Witnesses.
  - (5) Protection of Third Persons from liability.

Both Probate Code §4265 and §4101 were enacted as part of S.B. 1307. Stats. 1994, c. 307. Section 4265 was amended in 1999.<sup>i</sup>

First, Section 4265 does not "specifically provid[e] that it is not subject to a limitation in the power of attorney."

Second, Section 4265 does not apply to any of the 5 exceptions listed in §4101(b).

So, may a power of attorney grant an agent the power to deal with wills?<sup>ii</sup>

Perhaps the Statute of Wills and the general public policy regarding Wills and competency should require the principal execute the Wills.

Yet, given that trusts are often used as Will substitutes, and Powers of Attorneys can create trusts even if the principal is incompetent at the time of creation or executing the trust instrument, should there be a distinction between Wills and trusts?

If there should be a limitation, should it apply to revoke or amending as well as making?

If a POA is designed to avoid conservatorships, and a conservator can make a Will upon court approval under a substituted judgment, why shouldn't an agent under a Power of Attorney?

The Trusts and Estate Administration Committee thinks this issue should be explored, and a proposal made, either to add language to Section 4101(b) or to amend the provisions in Section 4265.

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<sup>i</sup> Prior to amendment, Section 4265 provided:

4265. A power of attorney may not authorize an attorney-in-fact to ~~perform any of the following acts:~~

~~(a) Make~~ make , publish, declare, amend, or  
revoke the principal's will.

~~(b) Consent to any action under a durable power of attorney for  
health care forbidden by Section 4722.~~

<sup>ii</sup> Note: Section 4264 contains the following language "unless expressly authorized in the power of attorney".

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

*Revised Staff Draft* RECOMMENDATION

Revision of the No Contest Clause Statute

January 2008

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335  
<commission@clrc.ca.gov>



# REVISION OF NO CONTEST CLAUSE STATUTE

## BACKGROUND

A no contest clause (also called an *in terrorem* clause) is a provision inserted in a will, trust, or other instrument to the effect that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share. Such a clause is intended to reduce litigation by beneficiaries whose expectations are frustrated by the donative scheme of the instrument.<sup>1</sup>

The Legislature has directed the Law Revision Commission to prepare a report weighing the advantages and disadvantages of enforcing a no contest clause in a will, trust, or other estate planning instrument.<sup>2</sup> In preparing the report, the Commission is to do the following:<sup>3</sup>

Review the various approaches in this area of the law taken by other states and proposed in the Uniform Probate Code, and present to the Legislature an evaluation of the broad range of options, including possible modification or repeal of existing statutes, attorney fee shifting, and other reform proposals, as well as the potential benefits of maintaining current law.

This report discusses the arguments for and against the enforcement of a no contest clause, the approach to enforcement taken in California and in other states, and problems that have arisen under the California statute. It concludes with a recommendation for changes to the existing statute.

## POLICIES FAVORING ENFORCEMENT

The longstanding general rule in California is that a no contest clause will be enforced: “No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator.”<sup>4</sup> Policies supporting that general rule are discussed below.

### **Effectuating Transferor’s Intent**

The law should respect a person’s ability to control the use and disposition of the person’s own property. That includes the ability to make a gift, either during life or

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1. The statutory law that governs enforcement of a no contest clause was enacted in 1990, on the recommendation of the Law Revision Commission. See *No Contest Clauses*, 20 Cal. L. Revision Comm’n Reports 7 (1990). It has been amended several times since enactment, adding a number of specific exceptions to the enforcement of a no contest clause. See 1994 Cal. Stat. ch. 40; 1995 Cal. Stat. ch. 730; 2000 Cal. Stat. ch. 17; 2002 Cal. Stat. ch. 150; 2004 Cal. Stat. ch. 183.

2. See SCR 42 (Campbell), enacted as 2005 Cal. Stat. res. ch. 122.

3. *Id.*

4. *George v. Burch*, 7 Cal. 4th 246, 254, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

1 on death. An owner may place a condition on a gift, so long as the condition  
2 imposed is not illegal or otherwise against public policy:

3 [The] testatrix was at full liberty to dispose of her property as she saw fit and  
4 upon whatever condition she desired to impose, so long as the condition was not  
5 prohibited by some law or opposed to public policy. The testatrix could give or  
6 refrain from giving; and could attach to her gift any lawful condition which her  
7 reason or caprice might dictate. She was but dealing with her own property and  
8 the beneficiary claiming thereunder must take the gift, if at all, upon the terms  
9 offered.<sup>5</sup>

10 As noted, there will be situations in which a no contest clause is unenforceable  
11 as a matter of public policy, notwithstanding the intentions of the transferor.<sup>6</sup>

## 12 **Avoiding Litigation**

13 There are a number of good reasons why a transferor would want to avoid  
14 litigation contesting the transferor's estate plan:

15 *Cost and Delay.* The cost of litigation depletes assets that were intended to go to  
16 the transferor's beneficiaries. That is generally undesirable, but it can also have  
17 unexpected effects on the relative value of the gifts given to different beneficiaries.  
18 For example, where one beneficiary is given a specifically identified asset and the  
19 other beneficiary takes the residue of the estate, litigation costs will  
20 disproportionately affect the second beneficiary.<sup>7</sup>

21 By deterring contest litigation, a no contest clause preserves the corpus of the  
22 estate and the transferor's dispositional plan.

23 *Discord Between Beneficiaries.* A dispute over the proper disposition of a  
24 transferor's estate can pit family members and friends against one another. The  
25 dispute may be protracted, emotional, and destructive of important personal  
26 relationships.

27 A transferor may execute a no contest clause in order to avoid just that sort of  
28 discord. For example, in *Estate of Ferber*,<sup>8</sup> the transferor had served as the  
29 personal representative of his father's estate, which was open for 17 years. He did  
30 not want his own representative to go through the same difficulties: "Due to his  
31 angst over this state of affairs and its negative impact on his health and quality of  
32 life, ... he directed his attorneys to prepare the strongest possible no contest  
33 clause."<sup>9</sup>

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5. Estate of Kitchen, 192 Cal. 384, 388-89, 220 P. 301 (1923).

6. See "Specific Public Policy Exceptions" *infra*.

7. See Prob. Code § 21402 (order of abatement).

8. 66 Cal. App. 4th 244 (1998).

9. *Id.* at 247.

1     *Privacy.* A contest proceeding may bring to light “matters of private life that  
2     ought not to be made public, and in respect to which the voice of the testator  
3     cannot be heard, either in explanation or denial....”<sup>10</sup> Unless a no contest clause is  
4     given effect, the resulting squabbles between disappointed beneficiaries could lead  
5     to “disgraceful family exposures,” as a result of which “the family skeleton will  
6     have been made to dance.”<sup>11</sup>

7     An effective no contest clause can prevent that sort of public airing of private  
8     matters.

#### 9     **Avoiding Settlement Pressure**

10    A disappointed beneficiary may attempt to extract a larger gift from the estate by  
11    threatening to file a contest. So long as the amount demanded is less than the cost  
12    to defend against the contest, there will be pressure to accede to the demand,  
13    regardless of its merits.

14    A no contest clause can be used to avoid that result. The potential contestant’s  
15    bargaining position is much reduced if filing a nuisance suit would forfeit the gift  
16    made to that person under the estate plan.

#### 17    **Use of Forced Election to Avoid Ownership Disputes**

18    In some cases, the proper disposition of a transferor’s property may be  
19    complicated by difficult property characterization issues.

20    For example:

21       A decedent is survived by his wife of many years. It was a second marriage for  
22       both spouses, each of whom had significant separate property assets of their own.  
23       Over the years of their marriage it became increasingly difficult to characterize  
24       ownership of their assets as separate or community property: gifts were made (or  
25       implied), accounts were mingled, community property contributions were made to  
26       separate property business interests, etc. Rather than put his beneficiaries to the  
27       expense and delay that would be required for a thorough property characterization,  
28       the transferor uses a no contest clause to avoid the issue.

29       The transferor claims that all of the disputed assets are his separate property,  
30       gives a gift to his surviving wife that is clearly greater than the amount she would  
31       recover if she were to contest the property characterization, and includes a no  
32       contest clause. This forces the surviving spouse to make a choice between  
33       acquiescing in the decedent’s estate plan and taking the amount offered under that  
34       plan, or forfeiting that amount in order to pursue her independent rights under  
35       community property law.

36       If the offer made in the estate plan is fair to the surviving spouse, she can save  
37       the estate money and time by accepting the gift offered (thereby effectively  
38       waiving any community property claim to purported estate assets).

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10. Estate of Hite, 155 Cal. 436, 441, 101 P. 443 (1909) (quoting *Smithsonian Inst. v. Meech*, 169 U.S. 398, 415 (1898)).

11. Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 Hastings L.J. 45 (1963) (citations omitted).

1 Similar facts were at issue in a recent case involving a forced election:

2 [Estate] planning for many married couples now entails allocating a lifetime of  
3 community and separate assets between the current spouse and children from a  
4 previous marriage. The difficulties inherent in ascertaining community interests in  
5 otherwise separate property pose a significant challenge to the testator or testatrix.  
6 If the testator or testatrix errs in identifying or calculating the community interests  
7 in his or her property, costly and divisive litigation may ensue and testamentary  
8 distributions in favor of one or more beneficiaries might unexpectedly be  
9 extinguished. As both the Legislature and courts have long recognized, no contest  
10 clauses serve an important public policy in these situations by reducing the threat  
11 of litigation and uncertainty.<sup>12</sup>

12 There are other situations, besides the disposition of marital property, that may  
13 give rise to a forced election of the type described above. For example, business  
14 partners may have mingled assets in a way that would make proper division  
15 difficult, or there may be a disputed debt owed by the decedent to a beneficiary. In  
16 such cases, a no contest clause and a sufficiently generous gift can resolve the  
17 matter without litigation.

#### 18 **Continuity of Law**

19 Many existing estate plans have been drafted in reliance on existing law. Any  
20 significant substantive change in the law governing the enforcement of a no  
21 contest clause could result in transitional costs, as transferors would be required to  
22 review their estate plans and make whatever changes make sense under the new  
23 law. If a transferor were to die before adjustments could be made, the estate plan  
24 could operate in an unintended way. Those concerns weigh in favor of continuing  
25 the substance of existing law.

### 26 **POLICIES FAVORING NON-ENFORCEMENT**

27 It is true that a transferor generally has the right to dispose of property on death  
28 as the transferor sees fit. The law does not require that an estate plan be wise or  
29 fair.

30 However, it has long been held that public policy concerns can trump a  
31 transferor's intention to create a no contest clause.<sup>13</sup> Specific policy concerns are  
32 discussed below.

#### 33 **Access to Justice**

34 As a general matter, a person should have access to the courts to remedy a wrong  
35 or protect important rights. A no contest clause works against that policy, by

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12. *George v. Burch*, 7 Cal. 4th 246, 265-66, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

13. *Estate of Kitchen*, 192 Cal. 384, 388-89, 220 P. 301 (1923) (no contest clause enforceable "so long as the condition was not prohibited by some law or opposed to public policy.").

1 threatening a significant loss to a beneficiary who files an action in court. In one of  
2 the earliest decisions holding that a no contest clause is unenforceable, the court  
3 based its holding on the importance of access to justice:

4 [It] is against the fundamental principles of justice and policy to inhibit a party  
5 from ascertaining his rights by appeal to the tribunals established by the State to  
6 settle and determine conflicting claims. If there be any such thing as public policy,  
7 it must embrace the right of a citizen to have his claims determined by law.<sup>14</sup>

#### 8 **Forfeiture Disfavored**

9 Because forfeiture is such a harsh penalty, it is disfavored as a matter of policy.  
10 Accordingly, a no contest clause should be applied conservatively, so as not to  
11 extend the scope of application beyond what was intended: “Because a no contest  
12 clause results in a forfeiture ... a court is required to strictly construe it and may  
13 not extend it beyond what was plainly the testator’s intent.”<sup>15</sup>

#### 14 **Judicial Action Required to Determine or Implement Transferor’s Intentions**

15 In order to effectuate a transferor’s intentions, it is necessary to ascertain those  
16 intentions. In some situations, a judicial proceeding may be required to do so. In  
17 those cases, a no contest clause could work against the effectuation of the  
18 transferor’s intentions, by deterring action that is necessary to determine or  
19 preserve those intentions. Areas of specific concern are discussed below.

20 *Capacity and Freedom of Choice.* An instrument should only be enforced if it  
21 expresses the free choice of a transferor who has the legally required mental  
22 capacity to understand the choice being made. An instrument that is the product of  
23 menace, duress, fraud, or undue influence is not an expression of the transferor’s  
24 free will and should not be enforced.<sup>16</sup> An instrument executed by a transferor who  
25 lacks the requisite mental capacity is also not a reliable expression of the  
26 transferor’s wishes and is invalid.<sup>17</sup> For obvious reasons, a forgery is not given  
27 effect.

28 If a no contest clause deters a beneficiary from challenging an instrument on any  
29 of those grounds, it may work against the transferor’s actual intentions, by  
30 protecting an instrument that should not be given effect.

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14. *Mallet v. Smith*, 6 Rich. Eq. 12, 20 (S.C. 1853). Notwithstanding that decision, South Carolina now follows the Uniform Probate Code approach; a no contest clause will be enforced in the absence of probable cause to bring a contest. S.C. Code Ann. § 62-3-905.

15. *George v. Burch*, 7 Cal. 4th at 254. See also Prob. Code § 21304 (no contest clause to be strictly construed).

16. See Section 6104 (will procured by duress, menace, fraud, or undue influence is ineffective); Civ. Code §§ 1565-1575 (contract procured by duress, menace, fraud, or undue influence is voidable).

17. See Prob. Code §§ 811-812 (capacity to convey property and contract), 6100.5(a) (capacity to make will).

1     *Ambiguity.* If a provision of a donative instrument is ambiguous, it may be  
2     difficult to determine the transferor's intentions. Different beneficiaries may argue  
3     for different meanings. Judicial construction of the instrument may be necessary to  
4     resolve the matter.<sup>18</sup>

5     To the extent that a no contest clause would deter the beneficiaries from seeking  
6     judicial construction of an ambiguous provision, it works against the policy of  
7     effectuating the transferor's intentions.

8     *Reformation or Modification of Instrument.* There may be instances where the  
9     meaning of a donative instrument is clear, but there is an unanticipated change in  
10    circumstances that would make the instrument ineffective to implement the  
11    transferor's purpose. In such a case, it may be appropriate to seek judicial  
12    modification of the instrument.

13    For example, a court may modify or terminate a trust, on the petition of a trustee  
14    or a beneficiary, "if, owing to circumstances not known to the settlor and not  
15    anticipated by the settlor, the continuation of the trust under its terms would defeat  
16    or substantially impair the accomplishment of the purposes of the trust."<sup>19</sup>

17    In such a case, a no contest clause could deter beneficiaries from seeking a  
18    judicial modification of an instrument that is necessary in order to effectuate the  
19    transferor's actual intentions.

## 20    **Judicial Supervision of Fiduciary**

21    Important public policies are served by judicial supervision of an executor,  
22    trustee, or other fiduciary, and such supervision should not be impeded by the  
23    operation of a no contest clause: "No contest clauses that purport to insulate  
24    executors completely from vigilant beneficiaries violate the public policy behind  
25    court supervision."<sup>20</sup>

## 26    **Misuse of Forced Election**

27    As discussed above,<sup>21</sup> a no contest clause may be used to force a beneficiary to  
28    either take whatever is offered under the transferor's estate plan or forfeit that gift  
29    in order to assert an independent interest in the estate assets (e.g., by filing a  
30    creditor's claim or disputing ownership or dispositive control of marital property).

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18. See 64 Cal. Jur. 3d *Wills* § 355 (2006) (construction of will); Prob. Code § 17200(b)(1) (construction of trust). Note that California exempts an action to construe an instrument from enforcement of a no contest clause. Prob. Code § 21305(b)(9).

19. Prob. Code § 15409. Note that California exempts an action to modify or reform an instrument from enforcement of a no contest clause. Prob. Code § 21305(b)(1), (11).

20. Estate of Ferber, 66 Cal. App. 4th 244, 253-54, 77 Cal. Rptr. 2d 774 (1998). Note that California exempts actions relating to the supervision of a fiduciary from enforcement of a no contest clause. Prob. Code § 21305(b)(6)-(8), (12).

21. See "Use of Forced Election to Avoid Property Ownership Disputes," *supra*.

1 Such a forced election may be entirely fair, where the amount offered to the  
2 beneficiary is sufficiently large to justify acquiescence in the estate plan. Costly  
3 litigation will be avoided and the details of the transferor's estate plan can be  
4 implemented as intended.

5 However, there are reasons for concern about the use of a no contest clause to  
6 force an election:

7 (1) *The beneficiary may settle for less than what is due.* Suppose that a  
8 surviving spouse has good reason to believe that the transferor's estate plan  
9 would transfer \$100,000 of property that is actually owned by the surviving  
10 spouse. If it would cost \$30,000 to adjudicate the matter, the surviving  
11 spouse might rationally accept a gift of \$80,000 rather than forfeit that  
12 amount in order to recover a net amount of \$70,000. If the inconvenience,  
13 risk, and delay of litigation are significant detriments, the surviving spouse  
14 might accept even less.

15 (2) *The estate plan may be inconsistent with the beneficiary's own dispositional*  
16 *preferences.* For example, a surviving spouse would have liked her share of  
17 a family business to pass to her children from a former marriage. Under  
18 community property law, she should be free to make that disposition of her  
19 own interest in the property. Instead, the transferor's estate plan transfers the  
20 entire business to his children from a former marriage. A no contest clause  
21 may coerce the surviving spouse into accepting that result, even though it is  
22 contrary to her own preferences as to the disposition of property that is by  
23 law under her control.

24 (3) *Unilateral disposition of community property violates public policy.*  
25 California law provides that one spouse may not make a gift of community  
26 property without the written consent of the other spouse,<sup>22</sup> but a forced  
27 election may, as a practical matter, have that effect. The surviving spouse  
28 has not given advance written consent. Any acquiescence in the result may  
29 well be the result of coercion. That may be especially true for an elderly  
30 surviving spouse.

31 These problems result from the "take it or leave it" nature of a forced election.  
32 The transferor is given unilateral control to frame the choice, without an  
33 opportunity for negotiation. The choice may be framed benevolently, so as to  
34 benefit everyone concerned, or it may be framed cynically or carelessly, offering a  
35 choice between two undesirable results.<sup>23</sup>

36 The benefits of a forced election could often be achieved through advance  
37 consultation and joint estate planning. If spouses cannot agree during life on the  
38 characterization or disposition of estate property, allowing one spouse to make  
39 unilateral decisions on death might be especially problematic.

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22. Fam. Code §§ 1100-1102.

23. See also *George v. Burch*, 7 Cal. 4th 246, 283-87, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994) (Kennard, J., dissenting) (arguing against use of no contest clause to create marital forced election).

TREATMENT OF NO CONTEST CLAUSES  
IN OTHER JURISDICTIONS

In all but two states, a no contest clause is generally enforceable. However, enforcement may be subject to a number of restrictions:

- In most states, a no contest clause will not be enforced if there is probable cause to bring the contest.
- In a few states, a probable cause exception applies to some, but not all, types of contests.
- In general, a no contest clause will not be enforced if enforcement would conflict with an important public policy. This has led to a number of specific public policy exceptions to enforcement. Some derive from court holdings, while others have been enacted by statute. California law includes several express public policy exceptions.
- Many states provide special rules of construction that limit or clarify the application of a no contest clause.

The differing approaches to the enforcement of a no contest clause are discussed more fully below.

**No Contest Clause Unenforceable**

In Florida and Indiana the enforcement of a no contest clause is prohibited by statute.<sup>24</sup>

Florida's prohibition was added in 1974 as part of a general adoption of the Uniform Probate Code.<sup>25</sup> It is not clear why Florida chose to diverge from the Uniform Probate Code approach of enforcing a no contest clause in the absence of probable cause to bring a contest.<sup>26</sup> Prior to enactment of the 1974 statute, the Florida courts would enforce a no contest clause unless the contest was brought in good faith and with probable cause, or was brought to "settle doubtful rights" and not for the purpose of destroying the will.<sup>27</sup>

Indiana's statutory prohibition on the enforcement of a no contest clause dates back to at least 1917.<sup>28</sup>

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24. See Fla. Stat. Ann. §§ 732.517 (wills), 737.207 (trusts); Ind. Code § 29-1-6-2.

25. H. Fenn & E. Koren, *The 1974 Florida Probate Code — A Marriage of Convenience*, 27 U. FLA. L. REV. 615 (1974). Note that the parallel provision governing trusts was added in 1993. See 1993 Fla. Stat. ch 257, § 12. The trust provision was recodified in 2006. See 2006 Fla. Stat. ch. 217, § 11.

26. "While this provision eliminates litigation about what constitutes 'probable cause,' it may have the effect of encouraging a disappointed beneficiary to use a will contest (or the threat thereof) to establish a bargaining position." *Id.* at 43.

27. See *Wells v. Menn*, 158 Fla. 228, 28 So.2d 881 (1946).

28. See *Doyle v. Paul*, 119 Ind. App. 632, 640-41, 86 N.E.2d 98 (1949) (quoting Acts of 1917, ch. 46, § 1, Burns' 1933, § 7-501).

1   **General Probable Cause Exception**

2   The majority approach in the United States is to provide a probable cause  
3   exception to the enforcement of a no contest clause. A no contest clause will only  
4   be enforced if the contestant lacks probable cause to bring the contest. That is the  
5   approach taken in the Uniform Probate Code,<sup>29</sup> which has been adopted in 17  
6   states.<sup>30</sup> Another 11 states have adopted a probable cause exception that is not  
7   derived from the Uniform Probate Code. In some of those states, good faith is also  
8   expressly required.<sup>31</sup>

9   No state has expressly defined the meaning of “probable cause” to bring a  
10   contest. However, the Restatement (Third) of Property states that probable cause  
11   exists if, at the time of instituting a proceeding, there is evidence that “would lead  
12   a reasonable person, properly informed and advised, to conclude that there was a  
13   substantial likelihood that the challenge would be successful.”<sup>32</sup>

14   **Selective Probable Cause Exception**

15   In New York and Oregon, there is a probable cause exception to enforcement of  
16   a no contest clause, but only if the contest is based on a claim of forgery or  
17   revocation.<sup>33</sup>

18   **Public Policy Exceptions**

19   In states that enforce a no contest clause, there are a number of specific  
20   exceptions that are based on public policy:<sup>34</sup>

21   *Construction and Reformation of Instrument.* To effectuate the transferor’s true  
22   intentions, it may be necessary to seek judicial construction of an ambiguous

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29. See Unif. Prob. Code §§ 2-517, 3-905 (1990).

30. See Alaska Stat. §§ 13.12.517, 13.16.555 (Alaska), A.R.S. § 14-2517 (Arizona), Colo. Rev. Stat. § 15-12-905 (Colorado), Haw. Rev. Stat. § 560:3-905 (Hawaii), Idaho Code § 15-3-905 (Idaho), Me. Rev. Stat. Ann. tit. 18-A, § 3-905 (Maine), Mich. Comp. Las Ann. § 700.2518 (Michigan), Minn. Stat. Ann. § 524.2-517 (Minnesota), Mont. Code Ann. § 72-2-537 (Montana), Neb. Rev. Stat. § 30-24.103 (Nebraska), N.J. Stat. Ann. § 3B:3-47 (New Jersey), N.M. Stat. Ann. § 45-2-517 (New Mexico), N.D. Cent. Code § 30.1-20-05 (North Dakota), 20 Pa.C.S.A. § 2521 (Pennsylvania), S.C. Code Ann. § 62-3-905 (South Carolina), S.D. Codified Laws § 29A-3-905 (South Dakota), Utah Code Ann. § 75-3-905 (Utah).

31. See *South Norwalk Trust Co. v. St. John*, 101 A. 961, 963 (Conn. 1917) (good faith also required) (Connecticut); *In re Cocklin’s Estate*, 17 N.W.2d 129, 136 (Iowa 1945) (good faith also required) (Iowa); *In re Foster’s Estate*, 190 Kan. 498, 500 (1963) (good faith also required) (Kansas); *Md. Estates and Trusts Code Ann. § 4-413* (Maryland); *Hannam v. Brown*, 114 Nev. 350, 357 (1998) (Nevada); *Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853, 856 (N.C. 1952) (North Carolina); *Tate v. Camp*, 245 S.W. 839, 844 (Tenn. 1922) (Tennessee); *Hodge v. Ellis*, 268 S.W.2d 275 (Tex. Ct. App. 1954) (Texas); *In re Estate of Chappell*, 127 Wash. 638, 646 (1923) (Washington); *Dutterer v. Logan*, 103 W. Va. 216, 221 (1927) (West Virginia); *In re Keenan’s Will*, 188 Wis. 163, 179 (1925) (Wisconsin).

32. Restatement (Third) of Property: Wills & Donative Transfers § 8.5 (2003).

33. New York Est. Powers & Trusts § 3-3.5(b)(1) (McKinney 2006); O.R.S. § 112.272(2). California has a similar rule. See Prob. Code §§ 21306, 21307.

34. California has the most extensive list of public policy exceptions. See Prob. Code § 21305(b).

1 provision or the modification, reformation, or termination of an instrument that has  
2 become incompatible with the transferor's intentions. The need to determine the  
3 transferor's actual intentions may trump the transferor's desire to avoid litigation.

4 [It] is the privilege and right of a party beneficiary to an estate at all times to  
5 seek a construction of the provisions of the will. An action brought to construe a  
6 will is not a contest within the meaning of the usual forfeiture clause, because it is  
7 obvious that the moving party does not by such means seek to set aside or annul  
8 the will, but rather to ascertain the true meaning of the testatrix and to enforce  
9 what she desired.<sup>35</sup>

10 A statutory exception for construction of an instrument exists in Arkansas, Iowa,  
11 and New York.<sup>36</sup>

12 *Action on Behalf of Minor or Incompetent.* In New York and Oregon, an action  
13 on behalf of a minor or incompetent to oppose the probate of a will is exempt from  
14 the application of a no contest clause.<sup>37</sup> Presumably, the concern is that a minor or  
15 incompetent should not suffer a forfeiture as a result of a decision that is made by  
16 another. The guardian may exercise poor judgment, resulting in a significant loss  
17 that cannot be recovered.

18 *Forfeiture for Action of Another.* In Louisiana, one court held that a no contest  
19 clause was unenforceable because it would cause all beneficiaries to forfeit if any  
20 of the beneficiaries were to contest the will.<sup>38</sup>

21 However, other jurisdictions, including California,<sup>39</sup> allow a no contest clause to  
22 condition a forfeiture of a beneficiary's interest on the actions of another person.<sup>40</sup>

23 *Failure to Provide Alternative Disposition.* In Georgia, a no contest clause in a  
24 will is not enforceable if the will fails to provide an alternative disposition of the  
25 assets that would be forfeited under the clause.<sup>41</sup>

26 *Procedural Exceptions.* New York provides a number of exceptions for specified  
27 actions relating to estate administration. A no contest clause does not apply to an  
28 objection to the jurisdiction of the court in which a will is offered for probate,<sup>42</sup> the

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35. Estate of Miller, 230 Cal. App. 2d 888, 903, 41 Cal. Rptr. 410 (1964).

36. Ellsworth v. Arkansas Nat'l Bank, 109 S.W.2d 1258, 1262 (Ark. 1937); Geisinger v. Geisinger, 41 N.W.2d 86, 93 (Iowa 1950); New York Est. Powers & Trusts § 3-3.5(b)(3)(E) (McKinney 2006).

37. New York Est. Powers & Trusts § 3-3.5(b)(2) (McKinney 2006); O.R.S. § 112.272(3).

38. Succession of Kern, 252 So.2d 507 (La. App., 1971).

39. Tunstall v. Wells, 144 Cal. App. 4th 554, 50 Cal. Rptr. 3d 468 (2006).

40. "[A] transferor may provide for the rescission of a gift to a grandchild in the event that the disinherited parent of the grandchild institutes proceedings either to contest the donative document or to challenge any of its provisions." Restatement (Third) of Property: Wills & Donative Transfers § 8.5, Comment (2003).

41. O.C.G.A. § 53-4-68(b).

42. New York Est. Powers & Trusts § 3-3.5(b)(3)(A) (McKinney 2006).

1 preliminary examination of witnesses,<sup>43</sup> a beneficiary's disclosure, to a court or  
2 otherwise, of information that is relevant to a probate proceeding,<sup>44</sup> or a failure to  
3 join in, consent to, or waive notice of a probate proceeding.<sup>45</sup>

#### Strict Construction

4 In addition to substantive limitations on the enforcement of a no contest clause,  
5 many states, including California, provide that a no contest clause must be strictly  
6 construed.<sup>46</sup> "Strict construction is consistent with the public policy to avoid a  
7 forfeiture."<sup>47</sup>

### SUMMARY OF CALIFORNIA LAW

9 California law on the enforcement of a no contest clause combines a number of  
10 different rules, as summarized below:

- 11 • A no contest clause is generally enforceable, subject to the exceptions  
12 described below.<sup>48</sup>
- 13 • Some types of "direct contests"<sup>49</sup> are subject to a probable cause (or  
14 "reasonable cause") exception.<sup>50</sup>

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43. New York Est. Powers & Trusts § 3-3.5(b)(3)(D) (McKinney 2006).

44. New York Est. Powers & Trusts § 3-3.5(b)(3)(B) (McKinney 2006).

45. New York Est. Powers & Trusts § 3-3.5(b)(3)(C) (McKinney 2006).

46. See Prob. Code § 21304. See also *Kershaw v. Kershaw*, 848 So. 2d 942, 954-55 (Ala. 2002) (Alabama); *Estate of Pepler*, 971 P.2d 694, 696 (Colo. App. 1998) (Colorado); *Estate of Wojtalewicz*, 418 N.E. 2d 418 (Ill. 1st Dist. 1981) (Illinois); *Saier v. Saier*, 366 Mich. 515 (1962) (Michigan); *Matter of Alexander*, 90 Misc. 2d 482, 486 (N.Y. 1977) (New York); *Estate of Westfahl*, 675 P.2d 21 (Okla. 1983) (Oklahoma); *Estate of Hodges*, 725 S.W.2d 265, 268 (Tex. Ct. App. 1986) (Texas).

47. Prob. Code § 21304 Comment.

48. Prob. Code § 21303.

49. A "direct contest" is a contest that attempts to invalidate an instrument or one or more of the terms of an instrument on the grounds of incapacity, failure of execution formalities, forgery, mistake, misrepresentation, menace, duress, fraud, or undue influence. See Prob. Code § 21300(b). A direct contest is the "traditional" form of contest. See former Probate Code Section 371, which described a will contest as follows:

Any issue of fact involving the competency of the decedent to make a last will and testament, the freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence, the due execution and attestation of the will, or any other question substantially affecting the validity of the will....

1931 Cal. Stat. ch 281.

50. Prob. Code §§ 21306-21307. Sections 21306 and 21307 overlap in application, but state nominally different standards for the exception. Section 21306 provides an exception for "reasonable cause," as defined. Section 21307 provides an exception for "probable cause." A court construing Section 21306 stated, in *dicta*, that the terms were synonymous. See *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002).

- 1 • An extensive list of “indirect contests”<sup>51</sup> are exempt from the enforcement
- 2 of a no contest clause on public policy grounds.
- 3 • An indirect contest based on a creditor claim or property ownership claim is
- 4 subject to a no contest clause, but only if the no contest clause specifically
- 5 provides for that application.<sup>52</sup> Application of a no contest clause to such
- 6 claims creates a “forced election.”
- 7 • A no contest clause may apply to an instrument other than the instrument
- 8 that contains the no contest clause, but only if the no contest clause
- 9 specifically provides for that application.<sup>53</sup>
- 10 • A declaratory relief procedure is available to determine whether a pleading
- 11 would violate a no contest clause.<sup>54</sup> The court may not provide declaratory
- 12 relief if doing so would require determination of the merits of the
- 13 contemplated action.
- 14 • A no contest clause is to be strictly construed.<sup>55</sup>

## 15 PROBLEMS UNDER EXISTING LAW

16 The Trusts and Estates Section of the State Bar has identified a number of  
17 problems with existing California law.<sup>56</sup> Existing law is perceived to be too  
18 complex and uncertain in its operation. That uncertainty leads to over-reliance on  
19 the declaratory relief procedure, to protect beneficiaries from any chance of  
20 unexpected forfeiture. The Trusts and Estates Section is also concerned that no  
21 contest clauses are being used to shield fraud and undue influence from judicial  
22 scrutiny. Finally, both the Trusts and Estates Section and the California Judges  
23 Association have expressed concern that forced elections may be used unfairly, to  
24 deprive an elderly surviving spouse of community property.<sup>57</sup>

25 In February 2006, the Commission conducted a survey of the members of the  
26 Trusts and Estate Section of the State Bar of California and the members of the  
27 California chapters of the National Academy of Elder Law Attorneys.<sup>58</sup> The survey

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51. An indirect contest is an action other than a direct contest that attempts to “indirectly invalidate” an instrument or one or more of its terms. Prob. Code § 21300(c).

52. Prob. Code § ~~21305~~21305(a)(1)-(2).

53. Prob. Code § ~~21305~~21305(a)(3).

54. Prob. Code § 21320.

55. Prob. Code § 21304.

56. See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004; Baer, *A Practitioner's View*, Cal. Tr. & Est. Q., Fall 2004; Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, Cal. Tr. & Est. Q., Fall 2004. But see MacDonald & Godshall, *California's No Contest Statute Should be Reformed Rather Than Repealed*, Cal. Tr. & Est. Q., Fall 2004.

57. See Second Supplement to CLRC Memorandum 2006-42, Exhibit p. 4 (Oct. 25, 2006) (available at [www.clrc.ca.gov](http://www.clrc.ca.gov)).

58. For full survey results, see CLRC Memorandum 2007-7 (Feb. 21, 2007) (available at [www.clrc.ca.gov](http://www.clrc.ca.gov)). The Commission received 351 responses to the survey. *Id.* at 4-5.

1 was designed to answer two questions: (1) Do practitioners believe that there are  
2 problems with existing law that are serious enough to justify a significant change  
3 in the law? (2) Which of the problems identified in the survey is most problematic?

4 Most survey respondents agreed that problems with existing law are serious  
5 enough to justify a significant change in the law.<sup>59</sup>

6 The problems identified by practitioners are discussed more fully below.

#### 7 **Uncertain Application**

8 The most common and serious problem reported by practitioners is uncertainty  
9 as to whether a particular no contest clause would apply to an intended action.<sup>60</sup>

10 That uncertainty has three main sources: (1) the open-ended definition of  
11 “contest,” (2) the complexity of existing law, and (3) the perceived failure of  
12 courts to construe no contest clauses strictly.

13 *Definition of “Contest.”* Under existing law, the concept of what constitutes a  
14 “contest” is open-ended. It can include any pleading in any proceeding in any court  
15 that “challenges the validity of an instrument or one or more of its terms.”<sup>61</sup> This  
16 means that any court pleading that affects estate assets or the operation of an  
17 instrument could potentially be governed by a no contest clause.<sup>62</sup>

18 The main limiting factor is the no contest clause itself. It defines what pleadings  
19 will trigger forfeiture under the clause.<sup>63</sup> If a clause is stated broadly or  
20 imprecisely, its scope of application may be uncertain. Each case will require the  
21 interpretation of unique language as applied to unique facts.

22 The Legislature has narrowed the scope of that problem by exempting many  
23 types of indirect contests from the operation of a no contest clause.<sup>64</sup> However, any  
24 attempt to list all pleadings that should be exempt as a matter of policy will  
25 inevitably be incomplete. Over time, new circumstances will arise that had not  
26 previously been considered.<sup>65</sup>

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59. Of those who expressed an opinion, 63% agreed or strongly agreed that there is a need for reform. Support for reform was strongest among those who self-identified as elder law practitioners. Eighty percent of elder law practitioners who expressed an opinion see a need for reform. *Id.* at 5.

60. Of those who expressed an opinion, 63% believe that this problem is common or very common and 65% found the problem to be of moderate or serious severity.

61. Prob. Code § 21300(a)-(c).

62. See, e.g., *Hermanson v. Hermanson*, 108 Cal. App. 4th 441, 133 Cal. Rptr. 2d 486 (2003) (petition to remove trustee); *In re Estate of Goulet*, 10 Cal. 4th 1074, 898 P.2d 425, 43 Cal. Rptr. 2d 111 (1995) (action to enforce premarital agreement); *Burch v. George*, 7 Cal. 4th 246, 27 Cal. Rptr. 2d 165, 866 P.2d 92 (1994) (action to determine whether purported estate asset is community property).

63. Prob. Code § 21300(a) (“‘Contest’ means any action identified in a ‘no contest clause’ as a violation of the clause.”).

64. Prob. Code § 21305(b).

65. For example, under existing law a petition to modify a trust to reflect changed circumstances is not subject to a no contest clause as a matter of public policy. See Prob. Code §§ 15409, 21305(b)(1). Such a modification serves to preserve the transferor’s intentions rather than thwart them. It should not cause a

Existing law also provides that a no contest clause will not be enforced against a creditor claim or property ownership claim, or applied to an instrument other than the instrument that contains the no contest clause, unless the no contest clause specifically provides for such application.<sup>66</sup> The question of whether a no contest clause is sufficiently specific in providing for such application may itself be a source of interpretive uncertainty.

*Complexity of Existing Law.* The existing statute is overly complex. This complexity has two sources:

(1) There are two separate sections that provide for a probable (or reasonable) cause exception for certain types of direct contests.<sup>67</sup> The sections overlap in their application; both apply to an attempt to invalidate a gift to a person who drafts or transcribes the instrument making the gift.<sup>68</sup> The overlap is problematic because each of the sections uses different language in defining the exception that it provides. Section 21306 provides an exception for a contest brought with “reasonable cause,” which is expressly defined. Section 21307 provides an exception for a contest brought with “probable cause,” which is left undefined. One court case has held, in dicta, that the terms were synonymous, but the question has not been decisively settled.<sup>69</sup>

(2) The limitations and exceptions that apply to indirect contests are governed by a complex set of application provisions. The limitation on forced elections only applies to instruments executed on or after January 1, 2001.<sup>70</sup> A codicil or amendment is governed by a different rule, which is drafted in very confusing language.<sup>71</sup> Certain public policy exceptions only apply if the transferor dies or the

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forfeiture. However, existing law does not provide a public policy exception for a petition under the Uniform Principal and Income Act (Prob. Code 16320 *et seq.*). It arguably should. The UPIA allows a trustee to impartially adjust between a trust’s principal and income, to reflect changes in the trust’s investment portfolio. If that power did not exist, necessary investment decisions might alter the balance of beneficial enjoyment between different groups of beneficiaries, contrary to what the transferor intended. As with modification of a trust under Section 15409, action under UPIA serves to preserve a transferor’s intentions despite an unanticipated change in circumstances. Nonetheless, a recent case held that a petition under UPIA would violate a no contest clause. *McKenzie v. Vanderpoel*, 151 Cal. App. 4th 1442, 60 Cal. Rptr. 3d 719 (2007).

66. Prob. Code § 21305(a).

67. See Prob. Code §§ 21306-21307.

68. *Cf.* Prob. Code §§ 21306(a)(3) and 21307(a)-(b).

69. *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002) (interpreting “reasonable cause” as used in Probate Code Section 21306).

70. Prob. Code § 21305(a).

71. Prob. Code § 21305(c).

1 instrument becomes irrevocable after January 1, 2001.<sup>72</sup> The remainder apply if the  
2 transferor dies or the instrument becomes irrevocable after January 1, 2003.<sup>73</sup>

3 In addition, certain specified exceptions do not apply if the contest is actually a  
4 “direct contest.”<sup>74</sup> There is no explanation of how the actions described in the  
5 specified exceptions might actually be direct contests. Nor is there any clear reason  
6 why certain exceptions have been singled out as posing that risk, while the  
7 remainder have not.

8 The complexity of these rules invites error. It contributes to uncertainty as to  
9 whether a particular action would be exempt from a no contest clause as a matter  
10 of law.

11 *Strict Construction.* Probate Code Section 21304 requires that a no contest  
12 clause be strictly construed. The Law Revision Commission recommended that  
13 rule in order to provide greater certainty as to the application of a no contest  
14 clause:

15 A major concern with the application of existing California law is that a  
16 beneficiary cannot predict with any consistency when an activity will be held to  
17 fall within the proscription of a particular no contest clause. To increase  
18 predictability, the proposed law recognizes that a no contest clause is to be strictly  
19 construed in determining the donor’s intent. This is consistent with the public  
20 policy to avoid a forfeiture absent the donor’s clear intent.<sup>75</sup>

21 Some practitioners believe that the courts have strayed from the rule of strict  
22 construction, by considering extrinsic evidence in construing the application of a  
23 no contest clause.<sup>76</sup> If extrinsic evidence is considered in construing a no contest  
24 clause, then a beneficiary cannot simply read the instrument to determine the  
25 meaning of the no contest clause. That creates a risk of unanticipated application  
26 and forfeiture.

#### 27 **Over-Reliance on Declaratory Relief**

28 The uncertainty that exists under current law can sometimes be resolved by  
29 declaratory relief pursuant to Probate Code Section 21320. That provision  
30 authorizes a beneficiary to seek judicial interpretation of a no contest clause to  
31 determine whether it would apply to a particular pleading. If the court finds that it  
32 does not apply, the beneficiary may proceed with the pleading without risk of  
33 forfeiture. The declaratory relief provides a safe harbor.

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72. Prob. Code § 21305(d).

73. *Id.*

74. Prob. Code § 21305(e).

75. *No Contest Clauses*, 20 Cal. L. Revision Comm’n Reports 7, 12 (1990).

76. Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at  
10.

1 That protection against forfeiture (and attorney malpractice) has led to  
2 widespread use of the declaratory relief procedure:

3 Prudent practitioners now routinely file petitions for declaratory relief under  
4 Probate Code § 21320. Californians now expect to have two levels of litigation  
5 when instruments contain a no contest clause: file a Probate Code § 21320  
6 petition and litigate the declaratory relief, and then litigate the substantive issues  
7 in another, separate proceeding.<sup>77</sup>

8 In fact, there may be a need for more than one declaratory relief proceeding in  
9 connection with a contest. If, in the course of litigation a contestant discovers new  
10 facts that could affect the nature of the contest, a “prudent practitioner will advise  
11 her client to file a new petition for declaratory relief. ... Indeed, in any complex  
12 proceeding with discovery producing evidence of new potential claims, a second  
13 or third filing pursuant to Probate Code § 21320 is likely.”<sup>78</sup>

14 That additional source of litigation adds costs to estates, beneficiaries, and the  
15 courts.<sup>79</sup>

16 Respondents to the Commission’s survey ranked the cost and delay associated  
17 with declaratory relief proceedings as the second most common and serious of the  
18 problems identified in the survey.<sup>80</sup>

#### 19 **Fraud and Undue Influence Shielded From Review**

20 An unscrupulous person may use a no contest clause to deter inquiry into  
21 whether a gift in an estate planning instrument was procured through duress,

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77. *Id.*

78. *Id.*

79. The Executive Committee of the Trusts and Estates Section has estimated the typical cost to a petitioner to obtain declaratory relief as follows:

In 20% of cases, \$1,500-5,000.

In 40% of cases, \$5,000-20,000.

In 30% of cases, \$20,000 to 50,000.

In 10% of cases, \$50,000 to 100,000.

The Executive Committee also surveyed several Superior Courts as to the average number of declaratory relief petitions filed in a year:

Alameda County Superior Court:	50 per year
Los Angeles County Superior Court:	212 per year
Orange County Superior Court:	100-150 per year
San Diego County Superior Court:	12-19 per year
San Francisco County Superior Court:	25 per year

If the average cost to a petitioner for declaratory relief is \$10,000, the figures above would suggest that declaratory relief procedure in the listed counties is costing petitioners over four million dollars in legal costs and fees annually. There would also be costs to those opposing the petitions and to the courts.

See CLRC Memorandum 2006-42 (Oct. 10, 2006), Exhibit pp. 7, 9-10 (available at [www.clrc.ca.gov](http://www.clrc.ca.gov)).

80. Of those who expressed an opinion, 61% believe that this problem is common or very common; 63% found the problem to be of moderate or serious severity.

1 menace, fraud, or undue influence. “Experienced practitioners are well aware that  
2 the no contest clause is a favorite device of undue influencers and those who use  
3 duress to become the (unnatural) object of a decedent’s bounty.”<sup>81</sup>

4 In general, the only way to contest a suspect instrument without forfeiture is to  
5 successfully invalidate the instrument. Even in a case where there is strong reason  
6 to suspect foul play, a beneficiary may still fall short of certainty that a contest  
7 would be successful. In such a case, the abuse may stand unchallenged.

8 Most Commission survey respondents indicate that the use of a no contest clause  
9 to shield elder financial abuse is a serious problem, but not a common one.<sup>82</sup>

#### 10 **Problematic Forced Election**

11 As discussed, a no contest clause can be used to create a forced election; the  
12 beneficiary is then forced to choose between taking the gift offered under the  
13 estate plan or forfeiting that gift in order to assert an independent legal right (such  
14 as a creditor claim or a claim of a community property interest in purported estate  
15 assets). A forced election can be used in a way that benefits all parties by making a  
16 generous gift to the beneficiary and thereby avoiding costly litigation.<sup>83</sup> A forced  
17 election can also be used in an unfair way, with the transferor claiming property  
18 that belongs to the beneficiary and offering a choice between the lesser of two  
19 evils: acquiesce in my disposition of your property or face forfeiture and the cost,  
20 delay, and uncertainty of litigation to secure your rights.<sup>84</sup>

21 The Commission asked survey participants to rank the frequency and severity of  
22 the following problem that could result from the use of a no contest clause:  
23 “Deterrence of a reasonable claim of ownership of estate assets.” The purpose of  
24 the question was to gauge the extent to which forced elections are seen by  
25 practitioners as problematic.

26 Respondents rated the deterrence of reasonable property ownership claims to be  
27 the least common and serious of the problems described in the survey; most  
28 respondents found the problem to be rare or uncommon.<sup>85</sup>

29 The survey results are consistent with the Commission’s general impression of  
30 opinion within the estate planning community. Opinion appears to be significantly

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81. See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at 11.

82. Of those who expressed an opinion, 55% believe that this problem is of moderate or serious severity, but only 42% found the problem to be common or very common. Concern is greater among self-identified elder law practitioners: 67% of those who expressed an opinion found the problem to be of moderate or serious severity; 62% found it to be common or very common. That probably reflects the nature of the cases handled by these specialists. CLRC Memorandum 2007-7 (Feb. 21, 2007) (available at [www.clrc.ca.gov](http://www.clrc.ca.gov)).

83. See “Use of Forced Election to Avoid Ownership Disputes” *supra*.

84. See “Misuse of Forced Election” *supra*.

85. Fifty-five percent of those who responded felt that the problem was uncommon or rare, and 44% described the severity of the problem as minor or insignificant. CLRC Memorandum 2007-7 (Feb. 21, 2007) (available at [www.clrc.ca.gov](http://www.clrc.ca.gov)).

1 divided on whether forced elections should be preserved as a useful planning tool,  
2 or prohibited as potentially unfair. There is no consensus that significant reform of  
3 the forced election is needed.

#### 4 FEE SHIFTING ALTERNATIVE

5 The Trusts and Estates Section of the State Bar has proposed that all no contest  
6 clauses be made unenforceable. The deterrence of contest litigation would instead  
7 be achieved through an award of costs and fees against a person who brings an  
8 unsuccessful direct contest without reasonable cause.<sup>86</sup>

9 The Commission does not recommend that approach, for two reasons:

##### 10 **Transferor Intention Disregarded**

11 The rationale for enforcement of a no contest clause is based primarily on  
12 deference to a transferor's intentions and the transferor's fundamental right to  
13 place a lawful condition on a gift of the transferor's property.

14 A statutory rule providing for an award of costs and fees against any  
15 unsuccessful contestant who lacks reasonable cause to bring a contest cannot be  
16 justified by reference to a transferor's intentions. Absent that intention, it is not  
17 clear that a beneficiary should be sanctioned for bringing an unsuccessful contest.  
18 The law already sanctions frivolous actions.<sup>87</sup>

##### 19 **Deterrence Undermined**

20 The purpose of a no contest clause is to deter contest litigation. Many of the  
21 harms that can result from litigation occur early in a contest (e.g., reputational  
22 harm to the transferor or beneficiaries, acrimony between beneficiaries, and  
23 pressure to settle with a dissatisfied beneficiary).

24 To deter those harms, forfeiture of a gift under a no contest clause is triggered by  
25 the mere filing of a pleading.<sup>88</sup> This creates a clear choice for a contestant. The  
26 only way to avoid forfeiture is to take no court action at all.

27 The proposed fee shifting alternative would not present that sort of bright line  
28 choice. Because the penalty for bringing an unreasonable contest would be the  
29 payment of defense costs and fees, the magnitude of the penalty would be  
30 proportional to the duration of the litigation. A contestant who simply files a  
31 pleading would bear little cost for doing so. A contestant who is willing to bear  
32 larger costs could go on to conduct discovery, in the hopes of finding evidentiary  
33 support for the contest. That sort of incremental exploratory litigation could cause  
34 many of the harms that a no contest clause seeks to avoid. It would also strengthen

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86. See Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, Cal. Tr. & Est. Q., Fall 2004, at 7-8.

87. See Code Civ. Proc. §§ 128.5-128.7.

88. See Prob. Code §§ 21300, 21303.

1 the bargaining position of a disappointed beneficiary who wants to negotiate a  
2 settlement that makes a larger gift to the beneficiary.

### 3 RECOMMENDATIONS

4 The Law Revision Commission recommends against making any fundamental  
5 substantive change to the existing no contest clause statute. As under existing law,  
6 a no contest clause should be enforceable unless it conflicts with public policy. A  
7 transferor should have the right to place lawful conditions on an at-death gift of the  
8 transferor's property.

9 Although the general policy of existing law would remain unchanged, the  
10 Commission recommends the following improvements to the existing statute:

- 11 • The statute should be simplified and clarified.
- 12 • The probable cause exception that applies to many direct contests should be  
13 extended to all direct contests and to unanticipated creditor claims.
- 14 • The scope of declaratory relief should be narrowed.

15 Those recommendations are discussed below.

#### 16 **Statutory Simplification and Clarification**

17 The uncertainty that arises under existing law is largely a result of the open-  
18 ended definition of "contest," combined with a complex and lengthy set of  
19 exceptions. Because any pleading relating to an estate could be governed by a no  
20 contest clause, every such pleading must be examined to determine whether it  
21 would, in fact, trigger a no contest clause. That analysis requires interpretation of  
22 the language used in the no contest clause and the interpretation and application of  
23 the statutory exemption scheme.

24 A simpler approach would be to limit the enforcement of a no contest clause to a  
25 list of specified contest types. Under that approach, any pleading that is not one of  
26 the expressly covered types would not be governed by a no contest clause. No  
27 further analysis would be required. That would eliminate both the open-ended  
28 definition of "contest" as well as the lengthy (and inevitably incomplete) list of  
29 statutory exceptions.

30 That is the approach taken in the proposed law.<sup>89</sup> A no contest clause could only  
31 be enforced in response to three types of contests: (1) a direct contest, (2) a  
32 creditor claim, or (3) a property ownership dispute.

33 *Direct Contest.* A direct contest is an attempt to invalidate an instrument on one  
34 or more of the following grounds: forgery; lack of due execution; lack of capacity;  
35 menace, duress, fraud, or undue influence; revocation of the instrument; or

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89. See proposed Prob. Code § 21311 *infra*.

1 disqualification of a beneficiary under Section 6112 or 21350.<sup>90</sup> No other  
2 pleadings would constitute a direct contest. There should be no ambiguity about  
3 whether a contest is a direct contest. The grounds for a direct contest would be  
4 limited and clear.

5 *Creditor Claim.* Under existing law, a transferor can draft a no contest clause  
6 that would apply to any creditor claim, including a claim for debts that have not yet  
7 arisen and that are not anticipated by the transferor. Such broad application serves  
8 to deter baseless claims that may be raised for the first time after the transferor's  
9 death.

10 However, such open-ended application to all creditor claims can also result in  
11 unintended consequences, by applying the no contest clause to a creditor claim that  
12 the transferor did not anticipate and would not have intended to be subject to the  
13 no contest clause.

14 For example, suppose a transferor executes an estate plan with a no contest  
15 clause that applies, by its terms, to all creditor claims. The estate plan makes a gift  
16 of \$50,000 to each of the transferor's four grandchildren. Ten years later, one of  
17 the grandchildren contracts to build an addition to the transferor's home, for  
18 \$25,000. The work is performed, but before the debt is paid, the transferor dies. If  
19 the no contest clause applies to the creditor claim, the beneficiary must choose  
20 between claiming the \$25,000 contractual debt (thereby forfeiting the \$50,000  
21 inheritance) or waiving the debt in order to receive the \$50,000 gift. Under those  
22 facts, it seems unlikely that the transferor would have intended the no contest  
23 clause to apply to the later-arising contractual debt.

24 Other unanticipated "creditor claims" might include a petition for a statutory  
25 family allowance, a claim for reimbursement of the expenses of the transferor's  
26 last illness, or a claim for reimbursement of the transferor's funeral expenses.<sup>91</sup> It  
27 is unlikely that a transferor would intentionally condition a gift on the waiver of  
28 such claims. Furthermore, enforcement of a no contest clause against such claims  
29 would seem to violate public policy.

30 In order to avoid the unintended application of a no contest clause to  
31 unanticipated creditor claims, the proposed law would differentiate between a  
32 creditor claim for an existing debt that is specifically identified in a no contest  
33 clause (a "specified debt"),<sup>92</sup> and a debt that arises after execution of the no contest  
34 clause or is not specifically identified as being subject to the clause (an  
35 "unspecified debt").<sup>93</sup>

36 As under existing law, there would be no limitation on the enforcement of a no  
37 contest clause against a beneficiary who brings a creditor claim for a specified

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90. See proposed Prob. Code § 21310(b) *infra*.

91. See Prob. Code § 11421.

92. See proposed Prob. Code § 21310(f) *infra*.

93. See proposed Prob. Code § 21310(g) *infra*.

1 debt.<sup>94</sup> That would continue the ability of a transferor to use a no contest clause to  
2 create a forced election with respect to such debts.

3 However, the proposed law would create a probable cause defense for a  
4 beneficiary who brings a creditor claim for an unspecified debt.<sup>95</sup> So long as the  
5 beneficiary has probable cause to bring the creditor claim, doing so would not  
6 cause a forfeiture under the no contest clause. In the hypothetical above, the  
7 grandchild could claim the contractual debt without forfeiting the gift made by the  
8 estate plan. Nor would a beneficiary forfeit for claiming a family allowance or  
9 compensation for funeral expenses, so long as the claim is brought with probable  
10 cause.

11 The transferor could still use a properly framed no contest clause to deter any  
12 baseless creditor claims that might arise after the execution of the no contest  
13 clause.

14 *Property Ownership Dispute.* Existing law provides for the application of a no  
15 contest clause to an “action or proceeding to determine the character, title, or  
16 ownership of property.”<sup>96</sup>

17 That language allows a transferor to create a forced election, providing that a  
18 beneficiary who contests the transferor’s ownership of purported estate assets  
19 forfeits any gift to that beneficiary made by the estate plan.

20 The existing statutory language appears to be overbroad for that purpose. Any  
21 action that would determine a beneficiary’s right to a gift under an estate plan  
22 could be characterized as an action to determine the “ownership of property.”<sup>97</sup>  
23 Under that reading, a no contest clause could be enforced against any pleading that  
24 would determine the distribution of property under the transferor’s estate.

25 The proposed law would restate the existing provision, so as to continue its  
26 substance while preventing overbroad interpretation. Under the proposed law, a no  
27 contest clause could be enforced against: “A pleading to challenge a transfer of  
28 property on the grounds that it was not the transferor’s property at the time of the  
29 transfer....”<sup>98</sup>

30 The proposed law would continue the ability of a transferor to use a no contest  
31 clause to create a forced election with respect to such disputes.

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94. See proposed Prob. Code § 21311(a)(3) *infra*.

95. See proposed Prob. Code § 21311(a)(4) *infra*.

96. Prob. Code § 21305(a)(2).

97. For example, if a beneficiary petitions for judicial construction of an ambiguous provision in a trust, the result might be to determine who receives a gift under that provision. That could be described as an action to determine the ownership of the gifted property. Under existing law, an action to construe an instrument is exempt from enforcement of a no contest clause as a matter of public policy. Prob. Code § 21305(b)(9).

98. See proposed Prob. Code § 21311(b) *infra*.

1     *Other Indirect Contests.* One of the main benefits of limiting the enforcement of  
2 a no contest clause to an express and exclusive list of contest types is that the  
3 existing attempt to describe public policy exceptions can be abandoned. That  
4 would eliminate a significant source of complexity and confusion in existing law.

5     The substantive effect of that change would be relatively modest. Existing law  
6 already exempts nearly all types of indirect contests from the operation of a no  
7 contest clause (other than forced elections).<sup>99</sup> The policy implication of that trend  
8 is clear. A beneficiary should not be punished for bringing an action to ensure the  
9 proper interpretation, reformation, or administration of an estate plan. Such actions  
10 serve the public policy of facilitating the fair and efficient administration of estates  
11 and help to effectuate the transferor's intentions, which might otherwise be undone  
12 by mistake, ambiguity, or changed circumstances.

13     The proposed law would merely extend that principle to its logical end, the  
14 exemption of all indirect contests other than forced elections.

15     *Terminology.* The proposed law would also define and use the term "protected  
16 instrument" to provide a clear rule as to which instruments are governed by a no  
17 contest clause.<sup>100</sup> Other minor terminological clarifications would also be made.<sup>101</sup>

#### 18     **Declaratory Relief Narrowed**

19     By limiting the application of a no contest clause to an exclusive list of defined  
20 contest types, the proposed law would eliminate much of the uncertainty that arises  
21 under existing law.

22     There should be little or no uncertainty as to whether a no contest clause would  
23 apply to a direct contest. The proposed law would eliminate declaratory relief as to  
24 that issue.

25     However, there could still be some uncertainty as to whether a no contest clause  
26 would apply to a creditor claim or property ownership dispute. The existing  
27 declaratory relief procedure would be retained for those issues only.<sup>102</sup>

28     The narrowed scope of the declaratory relief remedy should result in a  
29 significant reduction in pre-contest proceedings, with a savings in procedural costs  
30 for estates, beneficiaries, and the courts.

#### 31     **Expansion of Probable Cause Exception**

32     Existing law already provides a probable cause exception for a contest based on  
33 the following grounds:<sup>103</sup>

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99. Where the existing list of public policy extensions does not apply to an indirect contest, the gap in coverage is probably inadvertent. See *supra* note 66.

100. See proposed Prob. Code § 21310(e) *infra*.

101. See proposed Prob. Code § 21310(a) ("contest"), (c) ("no contest clause"), (d) ("pleading") *infra*.

102. See proposed amendment to Prob. Code § 21320 *infra*.

103. Prob. Code §§ 21306-21307.

- 1 • Forgery.
- 2 • Revocation.
- 3 • The beneficiary is disqualified under Probate Code Section 21350.
- 4 • The beneficiary drafted or transcribed the instrument.
- 5 • The beneficiary directed the drafter of the instrument (unless the transferor
- 6 affirmatively instructed the drafter regarding the same provision).
- 7 • The beneficiary is a witness to the instrument.

8 There is considerable overlap between the last four grounds, but they are all  
9 aimed at the same concern, a provision that is likely to have been the product of  
10 fraud or undue influence.

11 The existing probable cause exception does not apply to a direct contest brought  
12 on the following grounds: incapacity, menace, duress, or lack of due execution.  
13 The Commission sees no policy justification for that distinction. The proposed law  
14 would extend the existing probable cause exception to all types of direct  
15 contests.<sup>104</sup>

16 That extension of the existing exception would provide greater latitude to contest  
17 an instrument that is believed to have been the product of fraud, undue influence,  
18 or other misconduct.

19 The proposed law would define “probable cause” as follows:

20 [Probable] cause exists if, at the time of filing a contest, the facts known to the  
21 contestant would cause a reasonable person to believe that there is a reasonable  
22 likelihood that the requested relief will be granted after an opportunity for further  
23 investigation or discovery.<sup>105</sup>

24 That standard is drawn from existing Probate Code Section 21306, with two  
25 substantive changes:

26 (1) Existing law focuses only on the likelihood that the contestant’s “factual  
27 contentions” will be proven. The proposed law would require a likelihood that the  
28 requested relief will be granted.<sup>106</sup> That question depends not only on the proof of  
29 facts, but on the proof of facts that are sufficient to establish a legally sufficient  
30 ground for the requested relief. That is a more complete expression of the concept  
31 of probable cause.

32 (2) Existing law requires only that it be “likely” that the contestant will prevail.  
33 That degree of probability has been equated with the standard that governs

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104. See proposed Prob. Code § 21311(a) *infra*. As noted, *supra*, the probable cause exception would also be applied to a creditor claim based on an unspecified debt. See proposed Prob. Code §§ 21310(g), 21311(a)(4).

105. See proposed Prob. Code § 21311(b) *infra*.

106. See proposed Prob. Code § 21311(b) *infra*.

1 malicious prosecution cases, requiring only that the contest be “legally tenable.”<sup>107</sup>  
2 The Commission believes that such a standard is too forgiving. A no contest clause  
3 should deter more than just a frivolous contest. General law already provides  
4 sanctions for frivolous actions.<sup>108</sup>

5 Instead, the proposed law would require a “reasonable likelihood” of being  
6 granted relief.<sup>109</sup> That standard has been interpreted as requiring more than a mere  
7 possibility, but less than a likelihood that is “more probable than not.”<sup>110</sup>

#### 8 **Grace Period**

9 The proposed law would have a one-year deferred operation date.<sup>111</sup> That would  
10 provide a grace period for those who wish to revise their estate plans before the  
11 new law takes effect.

12 Once the proposed law becomes operative, its application would be governed by  
13 Probate Section 3. That section provides for the application of new law to  
14 instruments executed before the operative date of the new law, with specific  
15 exceptions to preserve the effect of certain completed acts and orders.<sup>112</sup> Section 3  
16 also provides a general exception that allows a court to apply prior law if it  
17 determines that retroactive application of the new law would substantially interfere  
18 with the rights of interested persons.<sup>113</sup>

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107. See *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002) (interpreting “reasonable cause” as used in Probate Code Section 21306). See also *Sheldon Appel Co. v. Albert & Olier*, 47 Cal. 3d 863, 254 Cal. Rptr. 336 (1989) (discussing malicious prosecution and frivolous appeal standards).

108. See Code Civ. Proc. § 128.5-128.7.

109. See proposed Prob. Code § 21311(b) *infra*.

110. See *Alvarez v. Superior Ct.*, 154 Cal. App. 4th 642, 653 n.4, 64 Cal. Rptr. 3d 854 (2007) (construing Penal Code § 938.1); *People v. Proctor*, 4 Cal. 4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033).

111. See Section 4 (uncodified) of the proposed law, *infra*.

112. Prob. Code § 3(c)-(f).

113. Prob. Code § 3(h).

PROPOSED LEGISLATION

**Prob. Code §§ 21300-21308 (repealed). No contest clauses**

SECTION 1. Chapter 1 (commencing with Section 21300) of Part 3 of Division 11 of the Probate Code is repealed.

**Prob. Code §§ 21310-21314 (added). No contest clauses**

SEC. 2. Chapter 1 (commencing with Section 21310) is added to Part 3 of Division 11 of the Probate Code, to read:

CHAPTER 1. GENERAL PROVISIONS

**§ 21310. Definitions**

21310. As used in this part:

(a) "Contest" means a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.

(b) "Direct contest" means a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on one or more of the following grounds:

(1) Forgery.

(2) Lack of due execution.

(3) Lack of capacity.

(4) Menace, duress, fraud, or undue influence.

(5) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant to Section 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.

(6) Disqualification of a beneficiary under Section 6112 or 21350.

(c) "No contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.

(d) "Pleading" means a petition, complaint, cross-complaint, objection, answer, response, or claim.

(e) "Protected instrument" means all of the following instruments:

(1) The instrument that contains the no contest clause.

(2) An instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

(f) "Specified debt" means a debt or liability that satisfies both of the following conditions:

(1) The debt or liability is expressly identified in a no contest clause, either individually or as part of an identifiable class of debts or liabilities, as being subject to the no contest clause.

(2) The debt or liability arose before the execution of the no contest clause that identifies it.

(g) “Unspecified debt” means a debt or liability that is not a specified debt.

**Comment.** Section 21310 is new. Subdivision (a) continues part of the substance of former Section 21300(b).

Subdivision (b)(1)-(5) continues the substance of former Section 21300(b), except that mistake and misrepresentation are no longer included as separate grounds for a direct contest.

Subdivision (b)(6) is consistent with former Sections 21306(a)(3) and 21307(c).

Subdivision (c) continues the substance of former Section 21300(c).

Subdivision (d) restates the substance of former Sections 21305(f).

Subdivision (e) is new. Subdivision (e)(1) provides that a protected instrument includes an instrument that contains a no contest clause. That may include an instrument that expressly incorporates or republishes a no contest clause in another instrument. Subdivision (e)(2) is similar to former Section 21305(a)(3).

Subdivision (f) is new.

Subdivision (g) is new.

#### § 21311. Enforcement of no contest clause

21311. (a) A no contest clause shall only be enforced against the following types of contests:

(1) A direct contest that is brought without probable cause.

(2) A pleading to challenge a transfer of property on the grounds that it was not the transferor’s property at the time of the transfer, if the no contest clause expressly provides for that application.

(3) The filing of a creditor’s claim or prosecution of an action based on it, for a specified debt.

(4) The filing of a creditor’s claim or prosecution of an action based on it, for an unspecified debt, if the no contest clause expressly provides for that application and the contest is brought without probable cause.

(b) For the purposes of this section, probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.

**Comment.** Section 21311 is new.

Subdivision (a)(1) generalizes the probable cause exception provided in former Sections 21306 and 21307, so that it applies to all direct contests.

Subdivision (a)(2) is similar to former Section 21305(a)(2). It provides for enforcement of a no contest clause in response to a pleading that contests a transfer or property on the ground that the property was not subject to the transferor’s dispositional control at the time of the transfer. Probable cause is not a defense to the enforcement of a no contest clause under this provision.

Subdivision (a)(3) continues former Section 21305(a)(1) without substantive change, except that a debt or liability must pre-date a no contest clause in order to be subject to the no contest clause under this provision. See Section 21310(f) (“specified debt”). Probable cause is not a defense to the enforcement of a no contest clause under this provision.

Subdivision (a)(4) is new. It provides for limited enforcement of a no contest clause against a creditor claim based on a debt or liability that arises after the execution of the no contest clause or that is not expressly identified in the no contest clause as being subject to the no contest clause. See Section 21310(g) (“unspecified debt”). The no contest clause must expressly provide for such application. Probable cause is a defense to the enforcement of a no contest clause under this provision.

Subdivision (b) restates the reasonable cause exception provided in former Sections 21306, with two exceptions:

(1) The former standard referred only to the contestant’s factual contentions. By contrast, subdivision (a) refers to the granting of relief, which requires not only the proof of factual contentions but also a legally sufficient ground for the requested relief.

(2) The former standard required only that success be “likely.” One court interpreted that standard as requiring only that a contest be “legally tenable.” In re Estate of Gonzalez, 102 Cal. App. 4th 1296, 1304, 126 Cal. Rptr. 2d 332 (2002). Subdivision (a) imposes a higher standard. There must be a “reasonable likelihood” that the requested relief will be granted. The term “reasonable likelihood” has been interpreted to mean more than merely possible, but less than “more probable than not.” See Alvarez v. Superior Ct., 154 Cal. App. 4th 642, 653 n.4, 64 Cal. Rptr. 3d 854 (2007) (construing Penal Code § 938.1); People v. Proctor, 4 Cal. 4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033). See Section 21310(b) (“direct contest” defined).

#### **§ 21312. Construction of no contest clause**

21312. In determining the intent of the transferor, a no contest clause shall be strictly construed.

**Comment.** Section 21312 continues former Section 21304 without change.

#### **§ 21313. Application of common law.**

21313. This part is not intended as a complete codification of the law governing enforcement of a no contest clause. The common law governs enforcement of a no contest clause to the extent this part does not apply.

**Comment.** Section 21313 continues former Section 21301 without change.

#### **§ 21314. Effect of contrary instrument**

21314. This part applies notwithstanding a contrary provision in the instrument.

**Comment.** Section 21314 continues former Section 21302 without change.

#### **Prob. Code § 21320 (amended). No contest clause**

SEC. 3. Section 21320 of the Probate Code is amended to read:

21320. (a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary, including, but not limited to, creditor claims under Part 4 (commencing with Section 9000) of Division 7, Part 8 (commencing with Section 19000) of Division 9, an action pursuant to Section 21305, and an action under Part 7 (commencing with Section 21700) of Division 11, would be a contest within the terms of the no contest clause and whether the no contest clause could be enforced against a particular pleading under paragraph (2) or (3) of subdivision (a) of Section 21311. The court shall not

1 make a determination under this section if the determination would depend on the  
2 merits of the proposed pleading.

3 (b) A no contest clause is not enforceable against a beneficiary to the extent an  
4 application under subdivision (a) is limited to the procedure and purpose described  
5 in subdivision (a).

6 ~~(c) A determination under this section of whether a proposed motion, petition, or~~  
7 ~~other act by the beneficiary violates a no contest clause may not be made if a~~  
8 ~~determination of the merits of the motion, petition, or other act by the beneficiary~~  
9 ~~is required.~~

10 ~~(d) A determination of whether Section 21306 or 21307 would apply in a~~  
11 ~~particular case may not be made under this section.~~

12 **Comment.** Section 21320 is amended to limit its scope of application. The procedure provided  
13 in the section may only be used to determine whether a no contest clause could be enforced  
14 under Section 21333(a)(2) or (3).

15 **Operative Date (uncodified)**

16 SEC. 4. This act becomes operative on January 1, 2010.